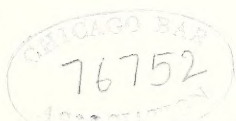






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IN THE MATTER OF THE ESTATE OF
LOUISA LAUDON, Deceased,

MATHILDA O. LAUDON, Individually
and as Administratrix of the
Estate of LOUISA LAUDON, Deceased,
and MELITTA M. LAUDON,

Appellants,

v.

BARBARA CAROLINA FRIEDERIKE AHNER,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion
of the court.

The question upon this appeal is whether Barbara
Carolina Friederike Ahner is the daughter of Louisa Laudon,
who died on July 6, 1924. Mathilda O. Laudon and Melitta
M. Laudon, the appellants, claim that she is not, and that
they are the only heirs at law and next of kin of the de-
ceased, and are entitled to the whole of the estate of the
deceased.

Letters of administration upon the estate of
Louisa Laudon having been issued by the Probate Court of
Cook County to Mathilda Laudon, the appellee, Barbara
Carolina Friederike Ahner (hereinafter called Mrs. Ahner)
filed a petition asking that the order of heirship be
changed so as to show that she, also, was one of the daughters
of Louisa Laudon and entitled to a share in the estate of

IN THE MATTER OF THE ESTATE OF
LOUISA LAMON, Deceased.

MATILDA C. LAMON, Individually
and as Administrator of the
Estate of LOUISA LAMON, Deceased,
and MELITA M. LAMON,

Appellants,

BARBARA CAROLINE FREEDMAN AMER,

Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Feb. 23, 1933.

MR. FRANKLIN THURGOOD TAYLOR delivered the opinion
of the court.

The question upon this appeal is whether Barbara
Caroline Freedman Amer is the daughter of Louisa Lamon,
who died on July 6, 1924. Matilda C. Lamon and Melita
M. Lamon, the appellants, claim that she is not, and that
they are the only heirs at law and next of kin of the de-
ceased, and are entitled to the whole of the estate of the
deceased.

Letters of administration upon the estate of
Louisa Lamon having been issued by the Probate Court of
Cook County to Matilda Lamon, the appellee, Barbara
Caroline Freedman Amer (hereinafter called Mrs. Amer) re-
plied a petition asking that the order of probate be
changed so as to show that she, also, was one of the daughters
of Louisa Lamon and entitled to a share in the estate of

the deceased.

On November 14, 1934, the Probate Court, by Judge Henry Horner, upon the petition and evidence offered, ordered that the prayer of the petition to remove Mathilda O. Laudon as administratrix be allowed; that letters of administration be issued to the petitioner; and that the order of heirship be amended to show that Mathilda, Melitta, and Mrs. Ahner were the daughters of, and the only heirs at law and next of kin of Louisa Laudon, deceased.

An appeal was taken from that order to the Circuit Court. There was a trial, de novo, without a jury, in the Circuit Court, and on December 3, 1935, after an extensive hearing, the Circuit Court found and decreed that Mathilda, Melitta and Mrs. Ahner were the daughters, and the only heirs and next of kin of Louisa Laudon, deceased. This appeal is by Mathilda and Melitta Laudon from that decree.

It is claimed for the appellants that the order or decree of the Circuit Court is contrary to the evidence.

The evidence is somewhat voluminous, various exhibits having been introduced, and the testimony of sixteen witnesses having been heard.

The evidence of Mrs. Ahner is to the effect that at the time of the trial she was 50 years of age; that she was born in Minneapolis; that she never discussed her birth with her mother until seven years ago; that there were six children born to Mr. and Mrs. Laudon, three sons Albert, Emil and Walter, all of whom died in infancy, and three

the deceased.

On November 14, 1935, the witness George, by

Judge Henry Horner, upon the petition and evidence offered
ordered that the prayer of the petition to remove William
G. London as administrator be allowed; that letters of
administration be issued to the petitioner; and that the
order of retainer be amended to show that William, William
and Mrs. Anna were the daughters of, and the only heirs
at law and next of kin of William London, deceased.

An appeal was taken from that order to the

Circuit Court. There was a trial, de novo, without a jury.
in the Circuit Court, and on December 2, 1935, after an oral
and written hearing, the Circuit Court found and decreed that William
London and Mrs. Anna were the daughters, and the only
heirs and next of kin of William London, deceased. This
appeal is by William and William London from that decree.

It is claimed for the appellants that the order
of decree of the Circuit Court is contrary to the evidence.
The evidence is somewhat voluminous, various
exhibits having been introduced, and the testimony of various
witnesses having been heard.

The evidence of Mrs. Anna is to the effect that
at the time of the trial she was 50 years of age; that she
was born in Minneapolis; that she never discussed her birth
with her mother until seven years ago; that there were six
children born to Mr. and Mrs. London, three sons and three
daughters, all of whom died in infancy, and three

daughters, Melitta, born in 1889; Mathilda, and she herself was born on March 22, 1887; that what her mother told her was different from the christening certificate, which was August 22, 1887; that her father and mother were married on October 12, 1886; that her mother, at the time of her death was between 72 and 74 years of age; that her mother's maiden name was Hermandt; that she was married under the name of Sotzman; that her father was nine years older than her mother.

In support of the contention that Mrs. Ahner was the daughter of Louisa Laudon, there was introduced a transcript of the Confirmation Record from the Bethlehem Evangelical Lutheran Church of Chicago, which shows that "Bertha Laudon" entered the school of that congregation on November 15, 1875, and was confirmed on April 10, 1881; that her father's name was August Laudon; that she was married to A. F. Ahner by the pastor, John Heyer, on August 21, 1888, and that she was born on August 22, 1887.

In further support of that contention, there was introduced an autograph album, said to have been given to her by her mother, Louisa Laudon, on her birthday in 1883, which contained, in the handwriting of Louisa Laudon, an inscription written in German, and signed by Louisa Laudon in German script, meaning, substantially, "Your loving mother."

The evidence of one Cross is to the effect that he had known Mrs. Ahner and Mrs. Laudon since 1882; that Mrs. Ahner always, that is for 42 or 43 years, called Mrs. Laudon, "Mother", and Mrs. Laudon addressed Mrs. Ahner

daughter, called, born in 1883; called, and she herself was born on March 22, 1887; that her mother told her was different from the corresponding certificate, which was August 20, 1887; that her father and mother were married on October 12, 1888; that her mother, at the time of her death was between 72 and 74 years of age; that her mother's maiden name was Hermann; that she was married under the name of Hermann; that her father was nine years older than her mother.

In support of the contention that Mrs. Anna was the daughter of Louis London, there was introduced a letter of the Londonian Agency from the Londonian Agency, which shows that "Bertha London" entered the record of that corporation on November 12, 1872, and was certified on April 12, 1881; that her father's name was August London; that she was married to A. F. Baker by the pastor, John Baker, on August 21, 1886, and that she was born on August 22, 1877.

In further support of that contention, there was introduced an autograph album, said to have been given to her by her mother, Louis London, on her birthday in 1882, which contained, in the handwriting of Louis London, an inscription written in German, and signed by Louis London in German script, meaning, substantially, "Your loving mother."

The evidence of one cross is to the effect that he had known Mrs. Anna and Mrs. London since 1882; that Mrs. Anna never, that is for 42 or 43 years, called Mrs. London, "mother," and Mrs. London addressed Mrs. Anna as

as her daughter Bertha; that he went to school with Mrs. Ahner when they were children; that her name was given at school as Bertha Laudon.

One Saxe testified that he had known Mrs. Ahner for 48 years, and that he heard her address Mrs. Laudon as "Mama," and Mrs. Laudon called her, "Bertha". Similar testimony was given by one John Wilkening, who testified that he had known Mrs. Ahner for 48 years; likewise, similar testimony was given by Herman Wilkening, and that on one occasion Mrs. Laudon stated that Bertha, meaning Mrs. Ahner, was her daughter, and, somewhat jestingly, told him, "You may be my son-in-law some day."

One Gustave Lender testified that he had known Mrs. Ahner and Mrs. Laudon since 1875; that he lived in the same household with them in September and October of 1900; that Mrs. Laudon gave him some rooms upstairs for himself, his wife and two daughters; that on one occasion he asked Mrs. Laudon, "why do you treat Mr. Laudon so unkind?" that after some talk, she said, "Well, you know Mr. Laudon took advantage of me before I was married, and Bertha was the result."

One Katie Reul stated that she knew Mrs. Ahner and Mrs. Laudon for 19 years; that on one occasion, about seven years before the trial, at Mrs. Ahner's house, Mrs. Laudon told her she had six children, three boys and three girls; that the three boys died, and three girls were still living; that that was said in the presence of a number of people.

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The husband of Mrs. Ahner testified that he and his wife were married on October 22, 1888; that he was a teacher at that time in South Chicago in a parochial school; that at one time Mathilda was one of his pupils; that he commenced calling on Mrs. Ahner at the home of Mrs. Laudon; that when he finally determined to ask Mrs. Ahner to become his wife, he asked her parents whether he could marry their daughter; that they told him she was a little wild; that if he was satisfied they would agree to it; that they were subsequently married, and Mr. and Mrs. Laudon were present; that he lived at the home of Mrs. Laudon about a year; that at that time they were living on a farm in Whiting; that during the time he visited at the Laudon home before his marriage, Mrs. Ahner called Mrs. Laudon, "Mother" and Mrs. Laudon called Mrs. Ahner, "Bertha".

There was offered in evidence for Mrs. Ahner the testimony of Edward Holter, Pastor of the Evangelical Lutheran Church of Chicago. He stated that he had charge of the records; that the records of the church were in existence since 1854; that he had the records of marriages from 1860 to 1870; that the record shows the marriage of August E. Laudon, with Louise C. Sotman in the year 1886; that the marriage was performed by Pastor Meyers on October 12, 1886; that August E. Laudon was born on August 16, 1839, and that Louise C. Sotman was born on April 24, 1848, in Germany.

One of the chief elements of the evidence for the appellants pertains to a conversation, which, it is stated, took place on Thanksgiving Day, 1919, in the presence of Mathilda and Melitta Laudon, who are acknowledged and

[illegible]

admitted to be the daughters of August and Louisa Laudon, and in the presence of Louisa Laudon, and of Mrs. Welk and Mrs. Abner, in which Louisa Laudon said that Mrs. Abner was not her daughter, but her step-sister. There is considerable testimony on the subject, but in the view we take of the case, it would be superfluous to set it forth in this opinion.

Besides Mathilda and Melitta Laudon, who testified for themselves, they called three other witnesses, Bremer, Clare and Jones. We have carefully examined all their evidence, and although in many ways it is directly contrary to the evidence for the appellee, we do not find that it is sufficiently convincing as to justify us, considering what the record here contains and considering the fact that the trial judge saw all the witnesses, in overriding his judgment. In such a case as this, the subject of credibility is very important, and as concerns that subject we are not as advantageously situated as was the trial judge. It is true, of course, in making proof of heirship, depending almost entirely on matters of memory, not infrequently, there is such confusion and contradiction in the evidence. Here, however, we feel constrained to hold that the evidence in support of the appellee's contention proves by an obvious preponderance, and sufficiently, that she is the daughter of Louisa Laudon.

For the reasons stated, the judgment will be affirmed.

APPROVED.
HOLDEN AND WILSON, JJ. CONCUR.

...to be the daughter of Augustus and Louisa ...
and in the presence of her mother, Mrs. ...
... in which Louisa ...
... but her daughter, but her ...
... on the subject, but in the ...
of the case, it would be ...

... in London, who ...
... they ...
... We have ...
... in many ...
... the evidence ...
... as to ...
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... all the ...
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For the reasons stated, the ...
...
...

DR. FRANK SMITHIES,

Appellee,

v.

HENRY E. BULLOCK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 23, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant, Henry E. Bullock, from a verdict and judgment in the Municipal Court in the sum of \$3,815.00, in favor of the plaintiff, Dr. Frank Smithies, for medical services which he claimed he rendered to the defendant.

The statement of claim alleged that the plaintiff and associates rendered services,- including daily visits while the defendant was in a hospital, from September 1, to September 23, 1923, and visits to the defendant's residence, from September 23 to November, 1923,- of the value of \$5,000.00; that there was paid on account, \$1,185.00, leaving a balance due of \$3,815.00.

The defendant's affidavit of merits alleged that the plaintiff did not render services of greater value than \$500.00; that the defendant had paid \$1,185.00; that he had paid more than the reasonable and customary charges for the services rendered; that the plaintiff had overcharged him, and he was entitled to recover, by way of set-off, \$685.00

and he was entitled to recover, payment of which, \$200.00, he had made through the plaintiff and was never repaid him.

as the amount of the overcharge.

There was a trial before the court, with a jury. On behalf of the plaintiff, he, himself, testified, and a Dr. Oleson, who was an associate, and the defendant, Bullock, who was called under Section 33. For the defendant, the defendant, himself, testified, and doctors Bacon, Miller, and Oleson. Various exhibits were introduced in evidence.

On August 27, 1923, the defendant, at the time about 71 years old, called to see the plaintiff at his office, with a letter of recommendation from a physician. The plaintiff was away on his vacation. The defendant met a Dr. Oleson who told him he was looking after the plaintiff's work and he would examine him and take care of him if he, the defendant desired. Dr. Oleson testified that the defendant said to go ahead. Dr. Oleson then examined him, part of the examination taking place on each of the five days, August 27, 28, 29, 30 and 31, and made a written report of his diagnosis. Dr. Oleson said that he ordered some X-rays taken, and recommended that the defendant go to the Henrotin Hospital; that he called on the defendant at the hospital each day thereafter until September 12, when the plaintiff returned from his vacation; that on September 12, he took the plaintiff to Henrotin Hospital and introduced him to the defendant. The last treatment the defendant received was on November 12, 1923.

To reverse the judgment, the following contentions

as the names of the overboarders.

There was a trial before the court, with a jury. On behalf of the plaintiff, he, himself, testified, and a Mr. Olson, who was an associate, and the defendant, which, was called under section 37. For the defendant, the defendant, himself, testified, and doctors Bacon, Miller, and Olson. Various exhibits were introduced in evidence.

On August 27, 1925, the defendant, at the time

about 71 years old, called to see the plaintiff at his office, with a letter of recommendation from a physician. The plaintiff was away during vacation. The defendant, who told him he was looking after the plaintiff's work and he would examine him and take care of him if he, the defendant, desired. Dr. Olson testified that the defendant said to go ahead. Dr. Olson then examined him, part of the examination being done on each of the five days, August 27, 28, 29, 30 and 31, and made a written report of his diagnosis. Dr. Olson said that he ordered some X-ray taken, and recommended that the defendant go to the Hamilton Hospital; that he called on the defendant at the hospital each day thereafter until September 12, when he finally returned from his vacation. That on September 12, he took the plaintiff to the Hamilton Hospital and introduced him to the defendant. The first treatment the defendant received was on November 12, 1925.

12, 1925

To reverse the judgment, the following questions

are made on behalf of the defendant, (1) that the court erred in the admission of certain evidence over the defendant's objection; (2) that the court erred in excluding competent testimony offered on behalf of the defendant; (3) that the trial judge, by his comments and remarks, and his frequent questioning of the plaintiff's witnesses and cross-examination of the defendant's witnesses; his criticism of counsel and witnesses, prejudiced the defendant's case and deprived him of a fair trial; (4) that the court erred in refusing an instruction, requested by the defendant, to the effect that the jury should not consider the defendant's wealth or income in determining the value of the plaintiff's services.

(1) In the course of the trial, upon cross-examination of the defendant, the plaintiff offered in evidence a letter, written by one Akia and directed to the plaintiff, dated November 28, 1923, pertaining to the controversy which had arisen between the defendant and the plaintiff in regard to the plaintiff's charges, and which contained the following:

"On this point, the writer is in a position to state positively that Mr. Bullock's average income (as returned for taxation) for the past three years, including his salary from the Illinois Malleable Iron Company, has been less than \$45,000, per annum, further reduced by many obligations 'not deductible' in his Income Tax Returns. With this additional information, coupled with Mr. Bullock's own views and recital of facts, the writer trusts you may see your way to modify the charge as rendered."

That was incompetent. It is true that the defendant, while on the stand, stated that he wished his counsel to ask him another question, and that his counsel asked what was his

... (1) that the
... in the examination of ...
... (2) that the court ...
... offered on behalf of the defendant;
... by his comments and remarks, and
... of the plaintiff's witness
... of the defendant's witness; his
... and witness, ...
... of a fair trial; (4) that
... on testimony, requested by
... that the jury should not
... in testimony.

(1) In the course of the trial, upon cross-
examination of the defendant, the plaintiff offered in
evidence a letter, written by the defendant and directed to
the plaintiff, dated November 25, 1933, pertaining to
the controversy which had arisen between the defendant
and the plaintiff in regard to the plaintiff's charges,
and which contained the following

... the writer is in a position
... (the defendant) for the past
... his salary from the 1st
... has been less than
... further reduced by many dollars
... in the income tax return.
... with
... at least, the
... to modify the

... It is true that the defendant, while
on the stand, stated that he wished his counsel to ...
... and that his counsel asked what was his

income as shown by his Income Tax for the year 1923, and that the witness answered, "A trifle over \$17,000," but it is apparent, from what took place between the witness, the court, and counsel for both sides, that there was a misconception as to the competency of evidence in regard to the financial condition of the defendant in such a case as this.

The law does not permit the value of the plaintiff's services as a doctor to be measured in any way by the poverty or riches of the one to whom they are rendered. The court said in Robinson v. Campbell, 47 La. 525,

"There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay, than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work. * * * If the ability to pay determines the reasonableness of a charge, then the richer a man is the more he should pay for any service. No such rule of charge can be recognized or countenanced by the law."

In Cotman v. Wisdom, 83 Ark. 601, the court held, in a suit for compensation for surgical services that evidence of the financial ability of the patient was not admissible. Morrell v. Lawrence, 203 Mo. 363; Merriessett v. Wood, 123 Ala. 384; Ward v. Kohn, 58 Fed. 483; Stevens v. Ellsworth, 63 N.W. 683. In the Morrell case the court said,

"In a case of this kind, if the plaintiff is entitled to recover at all, he is entitled to recover the reasonable value of the services rendered. He is entitled to a verdict for the reasonable value of his services, although the defendant may be a man of great wealth. The jury, in a case of this kind, have no concern with the question of the defendant's ability to satisfy the judgment."

the condition of the defendant in such a case as the prosecution as to the propriety of evidence is required to the court and counsel for both sides, that there was no agreement, then what took place between the witnesses and the witness answered, "I will be over \$17,000, and is known as shown by his income tax for the year 1933."

There is no more reason why this should be
be subject to the control of the ability of the
to pay, than that the merchant should
be subject to the control of the ability of the
to pay. The ability to pay is a matter of
fact, and it is not the business of the
law to create it. The law is not to be
used to create a new right, but to enforce
the old one. The law is not to be used to
create a new right, but to enforce the old one.

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In the Morrissett case the court said,

"The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, prima facie at least, the services rendered the one are of the same value as the same services rendered to the other."

In our judgment, the record discloses that considerable incompetent evidence as to the financial standing of the defendant was introduced, and that it constituted substantial error in the trial of the case.

(2) Error was also committed by the trial judge on the subject of hypothetical questions, which counsel for the defendant undertook to frame and propound to Dr. Miller, the witness called for the defendant. The record discloses that there was a very protracted colloquy, covering more than 20 pages, between counsel and the court in regard to the propounding of a hypothetical question as to the value of similar services to those alleged to have been rendered by the plaintiff, and that counsel for the defendant was practically prevented by the court from framing and having presented to the witness a proper hypothetical question, the trial judge being, apparently, of the opinion that a hypothetical question would not be competent based only on what the testimony tended to prove. Further, the trial judge, by constant interjections, prevented counsel for the defendant from formulating and presenting a coherent hypothetical question. While counsel for the defendant was undertaking to question the witness, as in the case of People v. Judycki, 308 Ill. 143, "there was a fusillade of

interrogations or remarks from the court," all of which taken together, obviously, prevented any orderly or coherent examination. Further, the trial judge seemed to be of the opinion that it was not proper for counsel to include in his hypothetical question what the evidence tended to show, but that he ought to permit the witness to read the testimony of the witnesses, and base the hypothetical question on what was read.

On this subject, the following colloquy between counsel for the defendant and the court took place:

"THE COURT: The usual hypothetical questions in a case of this kind - in the first place this is a suit over fees and hypothetical questions are not appropriate here, because there is no question as to the extent of a man's injuries or damages, or the extent of his illness.

MR. MARTIN: They are suing for money, though. Well, I am ready to state the question if your Honor permits it. If you rule I cannot I will defer.

THE COURT: Let him read Doctor Oleson's testimony and then state what he thought was the reasonable charge based on what Doctor Oleson testified was done for the man. That is perfectly proper.

MR. MARTIN: I have had this man down three different days -

THE COURT: That is your misfortune if you have trouble making your case,

interrogation or examination of the witness, all of which
taken together, obviously, presented any orderly or coherent
examination. Further, the trial judge seemed to be of the
opinion that it was not proper for counsel to insist in his
hypothetical question that the witness testify to what, but
that he was to permit the witness to read the testimony
of the witness, and then the hypothetical question on
what was asked.

On this subject, the following colloquy between
counsel for the defendant and the court took place:

"THE COURT: The usual hypothetical question is in a form
of this kind - in the first place this is a suit over your
hypothetical question as the not appropriate here, because
there is no question as to the extent of a man's injuries to
him, or the extent of his illness.

MR. HANLEY: They are asking for money, though, well.
I am ready to state the question if your honor permits.
If, if you rule I cannot I will take.

THE COURT: Let him read Doctor O'Connor's testimony and
then state what he thought was the reasonable charge based
on what Doctor O'Connor testified was done for the man. That
is usually proper.

MR. HANLEY: I have had this man down three different

times, and I have not been able to get any more out of him.

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VS.

Memoranda

Memoranda

Page 2 cont

Chambers & Smith

1. "Independent"

2. "Independent"

...of which ...
...evidently, presented any orderly or coherent
...the trial, which seemed to be of the
...that it was not proper for counsel to include in his
...questioned whether the evidence tended to show, and
...that he ought to permit the witness to read the statement
...of the statement, and leave the hypothetical question as
...that was made.

On this subject, the following colloquy between
counsel for the defendant and the court took place:

"THE COURT: The usual hypothetical question is ...
of this kind - in the first place this is a suit over ...
and beyond that, questions are not appropriate here, because
there is no question as to the extent of a man's injuries or
damages, or the extent of his illness.

MR. MARTIN: They are asking for money, though, isn't it?
I am ready to state the question if your honor permits me.
Q. If you wish I would I will ask.

THE COURT: Let him read Doctor O'Connor's testimony and
then state what he thought was the reasonable charge against
on what Doctor O'Connor testified was done for the man. That
is perfectly proper.

MR. MARTIN: I have had this man down three different
times -
THE COURT: That is your objection if you have any objection.

MR. MARTIN: I am not having trouble. I am going to rest on the right to proceed with my hypothetical question. If your Honor rules against me on that then I am through.

THE COURT: You could have had the testimony written up last night and he could have read it and could properly answer the question. If you want to continue the case to tomorrow in order to give him an opportunity to read Doctor Oleson's testimony and then ask him what he thinks was a reasonable fee for that service which Doctor Oleson rendered and which Doctor Smithies rendered, which he knows about, that is a proper question to a witness in this case."

Counsel for the defendant urge that it was agreed that a hypothetical question might be based upon knowledge to be obtained by the witness reading over the testimony of the plaintiff and the defendant. There was some discussion on that subject, and, seemingly, a reluctant acquiescence on the part of counsel for the defendant, but there was no agreement on the part of counsel for the defendant that he should not also be permitted to propound proper hypothetical questions based upon a statement of what the evidence itself tended to prove. The law requires that the jury should know just what facts are assumed and enter into the state of facts upon which the witness bases his opinion. Kempsey v. McGinnies, 21 Mich. 133; Forsyth v. Doolittle, 120 U.S. 73; People v. McElvaine, 121 N.Y. 250; Wigmore on Evidence, Sec. 672 et seq.

THE COURT: I am not having trouble. I am going to rest on the right to proceed with my hypothetical question. If your Honor wishes to object as to that then I will stop.

THE COURT: You would have had the testimony written up last night and he would have read it and could properly answer the question. If you want to continue the case to tomorrow in order to give him an opportunity to read Doctor Glavin's testimony and then ask him what he thinks was a reasonable fee for that service which Doctor Glavin rendered and which Doctor Callahan rendered, which he knows about, that is a proper question to a witness in this case.

THE COURT: Counsel for the defendant says that it was agreed that a hypothetical question might be asked upon knowledge to be obtained by the witness reading over the testimony of the plaintiff and the defendant. There was no agreement on that subject, and, accordingly, a relevant recross on the part of counsel for the defendant and, but not an agreement on the part of counsel for the defendant that he should not also be permitted to pose and answer hypothetical questions based upon a statement of what the witness itself wanted to know. The law requires that the jury should know just what facts are assumed and enter into the case of facts upon which the witness makes his opinion. Lawrence v. Lawrence, 21 Mich. 188; Lawrence v. Lawrence, 120 U.S. 539; Lawrence v. Lawrence, 120 U.S. 539. Witness on Recross, Nov. 27, 1902.

In our judgment, the court plainly erred in his discussion and rulings upon defendant's counsel's right to propound to the witness hypothetical questions.

(3) In the view we take of the case on this review, it does not become necessary to consider and pass upon the charge that the trial judge, by his comments or remarks prejudiced the defendant's case.

The record shows that in the course of the trial, a juror asked if he might ask a question, pertaining to the case, privately, and that "a juror, counsel and court retired to Chambers." That was highly improper, as thereafter the other eleven jurors did not have the same knowledge of the case that the other juror did, and it might affect the determination of the jury in the jury room after the case was submitted.

(4) In our opinion, the court erred in refusing to instruct the jury, as requested by counsel for the defendant, that the fact that the defendant had a large income did not authorize it to give to the plaintiff more than fair and reasonable compensation for the services rendered by the plaintiff to the defendant.

For the reasons stated and the errors committed, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HOLDOM AND WILSON, JJ. CONCUR.

In our judgment, the court plainly acted in his discretion and ruling upon defendant's counsel's right to propound to the witness hypothetical questions.

(3) In the view we take of the case in this regard it does not become necessary to consider and pass upon the charge that the trial judge, by his comments or remarks, prejudiced the defendant's case.

The record shows that in the course of the trial a juror asked if he might ask a question, pertaining to the case, privately, and that he asked, counsel and court refused to answer. That was highly improper, as there after the other eleven jurors did not have the same knowledge of the case that the other juror did, and it might affect the determination of the jury in the jury room after the case was submitted.

(4) In our opinion, the court acted in returning to instruct the jury, as requested by counsel for the defendant that the fact that the defendant had a large income did not authorize it to give to the juror any bias and reasonable compensation for the services rendered by the juror in the defendant's case.

For the reasons stated and the errors committed, judgment will be reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE
HONORABLE AND WISE, JUDGE.

147-33088

JOSEPH WRONA,

Appellee,

vs.

MIKE and KATE ZAMOJSKI,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendants, Mike and Kate Zamojski, husband and wife, from a verdict and judgment in the Superior Court in favor of Joseph Wrona, the plaintiff, for damages for an alleged assault.

The declaration recited that on August 27, 1925, the defendants, with force and arms assaulted the plaintiff, violently seized and laid hold of him and struck and beat him with their fists and a milk bottle, and in other ways, as a result of which he was seriously injured. The defendants pleaded not guilty.

No brief has been filed on behalf of the plaintiff. The brief of the defendants enumerates fifteen points; but the whole argument of them consists only of the following paragraph:

"The plaintiff did not produce any evidence to support the allegations in his declaration. There was no evidence tending to show that he had sustained any injuries as a result of an assault. To the contrary, the preponderance of the evidence tends to establish that the defendant, Kate Zamojski, was assaulted by the plaintiff and that the defendant, Mike Zamojski, came to the rescue of his wife. The plaintiff lost no time from his business; no competent testimony that he paid any hospital or doctor bills."

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The evidence of the plaintiff is that on August 27, 1935, he was in the grocery and butcher business at 4614 South Springfield Avenue, Chicago; that he was married and was living with his family, on the first floor of the building; that on August 27, 1935, between six and seven in the morning, the defendant, Kate Zamojski, came to the store and asked him for a quarter of a pound of boiled ham, and paid him sixteen cents and took the ham and went out of the store; that about four or five minutes later, she came back with the ham and said, "What kind boiled ham you give me?" that he asked her what was the matter with it; that she put it on the counter and he looked it over; that she said it had too much skin and fat; that he took a knife and cut off the skin and fat and put it on the scales, and then said to her to look at the scales that she had a quarter of a pound, and that if she did not like it, he would give her her money back and she could go to some other store; that she took the sixteen cents and went out; that about four or five minutes later she came back with her husband, and that her husband walked through back of the counter and grabbed him, the plaintiff, just below the shoulders, and said, "What is the matter with you?" that he, Mike, the defendant, held his, the plaintiff's hands while the defendant Kate hit him on the head, on his right temple, with a bottle, and broke the bottle; that his eyes were full of blood and he fell down on the counter, and the defendants went out through the front door; that he called the police, and they took him to the station and then to the

The defendant is the plaintiff in this case.

It is the duty of the plaintiff to prove his case.

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hospital; that they took two stitches in his head at the hospital; that he went to the hospital four or five times; that he had to stay in bed for a week; that meanwhile, his wife took care of the store; that glass was taken out of his head and a bandage put on; that there was a big lump on his head and it stayed there about a month; that before the accident he was very healthy, but afterwards, for three or four months, he could not sleep or eat, or do anything, because he had headaches every day; that he did not have such headaches before; that for months afterwards he could not sleep well. On cross-examination he testified that he was thirty-two years old, and weighed 145 pounds; that at the time of the trouble he weighed 150 to 155 pounds; that at the time the defendants came in, his wife and a Mrs. Brandeis were the only ones in the store, and he was behind the counter waiting on Mrs. Brandeis; that Mike took him in his arms while he was behind the counter, and the defendant Kate hit him on the head with a milk bottle; that he, himself, did not touch her at any time; that he never had any trouble with her before.

The witness Brandeis testified that she knew the plaintiff and his wife for six years prior to the time in question; that she, herself, is a married woman, 42 years of age; that she saw Kate buy something in the store and go out; that after a while Kate came back and threw the ham on the counter and said it was no good; that she did not want it; that the plaintiff took the ham and laid it aside and put some money on the counter; that the

I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

defendant Kate took the money and went home; that she came back a little later with her husband; that her husband, Mike, got the plaintiff in his arms, and while he was holding her by the arms, the defendant Kate, hit him on the head with a milk bottle, and then ran away; that the plaintiff fell down with his head broken; that the plaintiff did not strike anybody; that it happened about six o'clock in the morning.

The evidence of the witness Joe Micek, for the plaintiff, is to the effect that he was in the grocery store on the morning in question around 8:25 to get some ham for his lunch; that the defendant Kate came in and took some ham and went upstairs; that two or three minutes later, the defendant Kate came back and said, "What kind of ham did you give me?" that the butcher said the ham was all right; that she was shouting at the plaintiff, calling him dirty names; that the plaintiff did not say much; that he said, "If you don't like the meat you got your money and you can go somewhere else;" that the plaintiff put the money on the counter and she took the money and went home; that that was all he saw; that he did not see any fight.

The evidence of the defendant, Kate Samojaki, is to the effect that she took the ham back; that when she did so, the plaintiff took it from her hand and came out from behind the counter and grabbed her by the arm, and said, "You are not going to spoil my business here any more;" that he got her from the back and drove a nail through her flesh, and that he shook her and hit her in the back; that he hit her with something on the head, and hit her several times on the back with shoes; that she fell

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down and got cinders in her forehead, and that her husband then came and lifted her up; that she did not strike the plaintiff with a milk bottle, nor did she call him vile names; that afterwards she had to wear a bandage on her head.

The evidence of the defendant, Mike Zamojaki, is to the effect that he did not go into the plaintiff's butcher store, grab and pull him over the counter; that he went downstairs and heard his wife cry; that she was lying on the ground outside the store; that then he and his wife went upstairs; that he saw the marks on her arm and head; that he, himself, did not go inside the grocery store that morning.

Several witnesses testified for the defendants that they saw bruises on the arms, fingers and body of the defendant, Kate Zamojaki.

Several of the witnesses called on behalf of the plaintiff, testified that they did not see any cuts or bruises on the defendant Kate Zamojaki, although they saw her at or about the time in question.

It will be seen from the foregoing that the evidence is conflicting and contradictory, and, also, that the evidence in support of the plaintiff's case as to an unjustifiable assault and as to his injuries is such that this court of review would not be justified in overriding the verdict of the jury.

In such a case, one of the important elements is the credit to be given the witnesses who testify, and on that subject the jury were much more advantageously

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situated than we are. They saw the plaintiff and the defendants and the witnesses, and, so, were much more able to determine the credibility to be given to the testimony which they heard than we are. Moreover, the evidence as it appears here in the record is quite un-
sided, and quite obviously tends to support the verdict.

Such being the condition of the record, the judgment will be affirmed.

AFFIRMED.

HOLCOM AND WILSON, JJ. CONCUR.

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TEKLA M. MATURZYNSKA,

Appellant,

v.

EDWIN D. BUELL, as Trustee in
Bankruptcy of HOME CREDIT HOUSE,
INC., a corp., bankrupt,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On January 15, 1926, the complainant, Tekla M. Maturzynska, filed a bill of complaint in the Superior Court, asking that a certain indenture of lease, dated January 24, 1924, in which the complainant was lessor, and the Home Credit House, Inc. was lessee, be reformed by the insertion of certain additional words therein; and that an accounting be had and that the defendant, Edwin D. Buell, as trustee in bankruptcy of the Home Credit House, Inc., account for certain moneys deposited with it as security for the lease, and that the trustee in bankruptcy be restrained from proceeding with a certain suit in the Municipal Court, in which the complainant here is defendant.

On April 23, 1926, the complainant, pursuant to leave obtained, filed an amended bill of complaint.

On May 18, 1926, Edwin D. Buell, trustee filed an answer to the complainant's amended bill of complaint, and, also, a cross-bill, praying for an accounting between him and the complainant. On May 25, 1926, the complainant filed an answer to the cross-bill of complaint. There was

TERIA E. MATTHEWS

Appellant

ALBERT TROM

SUPERIOR COURT

DOCK COUNTY

ERWIN E. BELL, as Trustee in
Bankruptcy of HOME CREDIT HOUSE,
INC., a corp., Bankrupt

Appellee

MR. PRESIDING JUDGE TAYLOR delivered the
Opinion filed Feb. 22, 1936.

of the court.

On January 15, 1936, the complainant, Teria E. Matthews, filed a bill of complaint in the Superior Court, asking that a certain indenture of lease, dated January 24, 1934, in which the complainant was lessor, and the Home Credit House, Inc. was lessee, be returned by the insertion of certain additional words therein; and that an accounting be had and that the defendant, Erwin E. Bell, as trustee in bankruptcy of the Home Credit House, Inc., account for certain moneys deposited with it as security for the lease, and that the trustee in bankruptcy be restrained from proceeding with a certain suit in the Municipal Court, in which the complainant here is defendant.

On April 22, 1936, the complainant, pursuant to leave obtained, filed an amended bill of complaint.

On May 18, 1936, Erwin E. Bell, trustee filed an answer to the complainant's amended bill of complaint, and, also, a cross-bill, trying for an accounting between him and the complainant. On May 22, 1936, the complainant filed an answer to the cross-bill of complaint. There was

a trial before the Chancellor, and on February 16, 1937, a decree was entered which contained, among others, the following findings:

That on April 20, 1925, an involuntary petition in bankruptcy was filed against the Home Credit House, Inc. and on May 20, 1926, it was adjudged a bankrupt; that on April 22, 1925, one Edwin D. Buell was appointed receiver, and took possession of the assets of the company; that on June 9, 1925, he was elected trustee in bankruptcy;

That on January 24, 1924, the Home Credit House, Inc. entered into a written lease, as lessee and party of the second part, with the complainant, as lessor and party of the first part, of the store known as 1151 Milwaukee Avenue, Chicago, which lease ran from March 15, 1924, to March 15, 1929.

That the lease contained the following provisions:

"It is further understood and agreed that the party of the second part shall deposit with the party of the first part as security for his prompt performance of the terms and covenants in the said lease by him to be kept and performed, the sum of Two Thousand Dollars (\$2,000.00).

"It is specifically understood that the said security shall not apply in payment of any rents, and the party of the first part hereby agrees to return to the party of the second part the said sum of Two Thousand (\$2,000.00) upon termination of said lease, and the vacation of the said premises in good condition by the Lessee."

That \$1800.00 of the said \$2,000.00 was deposited by the lessee with the lessor, as called for by the above provisions of the lease. That the lease, also, contained the following provisions:

a trial before the Chancellor, and on February 16, 1937, a decree was entered which contained, among others, the following findings:

That on April 30, 1935, an involuntary petition in bankruptcy was filed against the Home Credit House, Inc., and on May 30, 1935, it was adjudged a bankrupt; that on April 28, 1935, one Edwin D. Smith was appointed receiver, and took possession of the assets of the company; that on June 2, 1935, he was elected trustee in bankruptcy; That on January 24, 1934, the Home Credit House, Inc., entered into a written lease, as lessee and party of the first part, with the complainant, as lessor and party of the first part, of the store known as 151 Milwaukee Avenue, Chicago, which lease ran from March 15, 1934, to March 15, 1935.

That the lease contained the following provisions:

"It is further understood and agreed that the party of the second part shall deposit with the party of the first part as security for his prompt performance of the terms and covenants in the said lease by him to be kept and performed, the sum of Two Thousand Dollars (\$2,000.00)."

"It is specifically understood that the said security shall not apply in payment of any rents, and the party of the first part hereby agrees to return to the party of the second part of the said sum of Two Thousand Dollars (\$2,000.00) upon termination of said lease, and the vacation of the said premises in good condition by the lessee."

That \$1500.00 of the said \$2,000.00 was deposited by the lessee with the lessor, as called for by the above provisions of the lease. That the lease, also, contained the following provisions:

"It is expressly agreed, between the parties hereto, that if default be made in payment of the rent above reserved, or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the party of the second part, it shall be lawful for the party of the first part or the legal representatives of said party, at any time thereafter, at the election of said first party, or the legal representatives thereof, without notice or demand of rent, to declare said terms ended, and to reenter said demised premises -----, either with or without process of law -----, and the said premises again to repossess and enjoy as before this demise."

That on May 2, 1925, the complainant served or procured to be served upon the Home Credit House, Inc., the following notice in writing:

"PLEASE TAKE NOTICE that you have failed to pay me, on May 1, 1925, the sum of Three Hundred (\$300.00) Dollars, for rent, and the further sum of Two Hundred (\$200.00) Dollars as security, as provided in the lease dated January 24, 1924, executed by you.

"I have, therefore, elected to, and do hereby declare said lease terminated, and you are hereby notified to and directed to surrender possession of the store demised by said lease, commonly known as 1151 Milwaukee Avenue, Chicago, Illinois. * * *

"You are further notified that by reason of your permitting a petition in bankruptcy to be filed against your firm, and having a receiver appointed of the assets thereof, and of your interest in the above mentioned lease, and by reason of other defaults herein mentioned, and otherwise occurring, I have heretofore elected, and do hereby declare the said lease terminated.

"You are further notified that I hereby likewise declare forfeited the sum of money heretofore deposited by you with me as additional security for the terms of said lease, all in accordance with the terms thereof."

That by the service of said notices, the complainant and cross-defendant elected to and did terminate the lease, and reentered and took possession of the premises, and thereupon their relationship of landlord and tenant ceased and terminated, and the cross-defendant became

"It is expressly agreed, between the parties hereto, that it shall be made in payment of the rent above recited, or any part thereof, or in any of the covenants and agreements herein contained, to be kept by the party of the second part, it shall be lawful for the party of the first part or the legal representative of said party, at any time thereafter, at the election of said first party, or the legal representative thereof, without notice or demand of rent, to declare said terms ended, and to reenter said premises, either with or without process of law, and the said premises again to repossess and enjoy as before this demise."

That on May 2, 1935, the complainant served or procured to be served upon the Home Credit House, Inc., the following notice in writing:

"PLEASE TAKE NOTICE that you have failed to pay me, on May 1, 1935, the sum of Three Hundred (\$300.00) Dollars, for rent, and the further sum of Two Hundred (\$200.00) Dollars as security, as provided in the lease dated January 24, 1934, executed by you."

"I have, therefore, elected to, and do hereby declare said lease terminated, and you are hereby notified to and directed to surrender possession of the store demised by said lease, commonly known as 1121 Milwaukee Avenue, Chicago, Illinois."

"You are further notified that by reason of your executing a petition in bankruptcy to be filed against your firm, and having a receiver appointed of the estate thereof, and of your interest in the above mentioned lease, and by reason of other defaulting herein made, and otherwise occurring, I have heretofore elected, and do hereby declare the said lease terminated."

"You are further notified that I hereby likewise have forfeited the sum of money heretofore deposited by you with me as additional security for the terms of said lease, all in accordance with the terms thereof."

That by the service of said notice, the complainant and cross-defendant elected to and did terminate the lease, and reentered and took possession of the premises, and thereupon their relationship of landlord and tenant ceased and terminated, and the cross-defendant became

liable to account for and pay to the cross-complainant, Edwin D. Buell, as trustee, the sum of \$1800.00, which had been deposited as security for the performance of the lease;

That all the rents up to the month of April, 1925, were paid by the Home Credit House, Inc., and that the premises were vacated in good condition by the lessee; that on and after April 22, 1925, and the balance of the month of April, 1925, Buell, as receiver of the bankrupt company, was in possession of the premises covered by the lease;

That the sum of \$1800.00 was deposited with the lessor under the lease as security for its performance, and "is a penalty in law, which upon the termination of said lease as aforesaid," the cross-defendant was bound to repay to the cross-complainant, the trustee, in bankruptcy of the lessee;

That the trustee in bankruptcy never occupied the premises involved in this suit; that he was not elected as such trustee until June 9, 1925; that the lease between the complainant and the Home Credit House, Inc. was terminated on May 2, 1925, and the relationship of landlord and tenant between them ceased to exist on and after that date;

That there was no mutual mistake of the parties to said lease in the drafting and signing and no case had been made out by the complainant entitling her to a reformation of the lease.

The decree ordered that the bill of complaint filed

liable to account for and pay to the cross-complainant,
Edward D. Wells, as trustee, the sum of \$1800.00, which
had been deposited as security for the performance of
the lease;

That all the rents up to the month of April, 1935,
were paid by the Home-Credit House, Inc., and that the
premises were vacated in good condition by the lessee;
that on and after April 22, 1935, and the balance of the
month of April, 1935, Wells, as receiver of the bankrupt
company, was in possession of the premises covered by the
lease;

That the sum of \$1800.00 was deposited with the
lessor under the lease as security for its performance,
and "as a penalty in law, which upon the termination
of said lease as aforesaid," the cross-defendant was bound
to repay to the cross-complainant, the trustee, in bankruptcy
of the lessee;

That the trustee in bankruptcy never occupied
the premises involved in this suit; that he was not elected
as such trustee until June 2, 1935; that the lease between
the complainant and the Home Credit House, Inc. was terminated
on May 2, 1935, and the relationship of landlord and tenant
between them ceased to exist on and after that date;

That there was no mutual mistake of the parties
to said lease in the drafting and signing and no case had
been made out by the complainant entitling her to a reformu-
lation of the lease.

The lessee ordered that the bill of complaint filed

by Tekla M. Maturzynska, be dismissed for want of equity; that the defendant and cross-complainant, Edwin D. Buell, as trustee in bankruptcy of the Home Credit House, Inc. have and recover from the complainant, Tekla M. Maturzynska, the sum of \$1800.00 and costs. This appeal is from that decree.

It is contended for the complainant, Tekla M. Maturzynska, that the evidence showed that through the mutual mistake of the parties and the scrivener, a paragraph was left out of the lease.

The allegation in the bill of complaint as to what is claimed was left out of the lease is as follows:

"that it was the intention, understanding and agreement of your oratrix and said Home Credit House, Inc., by and with the duly authorized officers thereof, that said sum of \$2,000 in said lease and rider therein mentioned to be deposited by said Home Credit House, Inc., with your oratrix, was for the purpose of securing and guaranteeing her against loss in the event that said lease was terminated by operation of law, or by the bankruptcy of said Home Credit House, Inc."

In an early case, Adams v. Robertson, 37 Ill. 45, the court said:

"Written instruments are made to express the agreements of parties, and the safety of community requires allegations of mistake in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory. Parties after the lapse of time, and under other circumstances, may differ, widely as to the terms of an agreement, and experience has demonstrated the necessity of preserving them in a repository more safe than the recollection of witnesses."

National Fire Ins. Co. v. John Spry Lumber Co., 235 Ill. 98;

Hoops v. Fitzgerald, 204 Ill. 325; Bonney v. Stoughton, 122

by Felix A. Natunayana, be dismissed for want of equity; that the debt and cross-complaint, Edwin D. Buel, as trustee in bankruptcy of the Home Credit House, Inc., have and recover from the complainant, Felix A. Natunayana, the sum of \$1800.00 and costs. This appeal is from that decree.

It is contended for the complainant, Felix A. Natunayana, that the evidence showed that through the mutual mistake of the parties and the scrivener, a prom-
 graph was left out of the lease.

The allegation in the bill of complaint as to what is claimed was left out of the case is as follows:

"That it was the intention, understanding and agreement of youratrix and said Home Credit House, Inc., and with the duly authorized officers thereof, that said sum of \$8,000 in said lease and rider therein mentioned to be received by said Home Credit House, Inc., with youratrix, was for the purpose of securing and maintaining her against loss in the event that said lease was terminated by operation of law, or by the bankruptcy of said Home Credit House, Inc."

In an early case, Adams v. [unclear], 27 Ill. 48, the court said:

"Written instruments are made to express the agreements of parties, and the safety of community requires allegations of mistake in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory. Parties alter the lapse of time, and under other circumstances, may differ widely as to the terms of an agreement, and experience has demonstrated the necessity of preserving them in a repository more safe than the recollection of witnesses."

Ill. 536, Steinmeyer v. Schroeppel, 226 Ill. 9; Miner v. Hess, 47 Ill. 170.

The question arises whether the alleged mistake was proven by clear, satisfactory and convincing evidence. The evidence for the complainant on the matter in question, was introduced in an effort to show that the scrivener, in drafting the lease on January 24, 1924, omitted therefrom a particular clause. There is considerable evidence in regard to what it is claimed were, or should be, the contents of the clause, that is, just how it should read. It is claimed on behalf of the complainant that the parties met on January 24, 1924, at the Hatterman & Glanz State Bank, 1112 Milwaukee Avenue, Chicago, and entered into the lease in question. It is the evidence of one Ossowski, a clerk in that bank, that the lease was executed in his presence; that there were present at the time, Fleischmann and Hollander, who were officers of the Home Credit House, Inc., Goldman, one of their representatives and attorney, the complainant, and one Bagno; that the President asked him to put in the lease a security clause in case they should go bankrupt if the place should remain vacant; that \$2,000.00 was to stay in her possession; that he dictated that to a stenographer; that when the lease was finished, he just glanced at it, and told the persons present that he was inserting a clause in the rider; that they proceeded to sign it after they examined the lease; that the complainant looked it over, although he could not say that she read it; that as a matter of fact, the clause referring to the \$2,000.00 was left out.

The question arises whether the alleged mistake was proven by clear, satisfactory and convincing evidence, the evidence for the complainant on the matter in question, was introduced in an effort to show that the witnesses, in drafting the lease on January 24, 1924, omitted therefrom a particular clause. There is considerable evidence in regard to what it is claimed were, or should be, the contents of the clause, that is, just how it should read. It is claimed on behalf of the complainant that the parties met on January 24, 1924, at the Hattelman & Glanz State Bank, 1112 Milwaukee Avenue, Chicago, and entered into the lease in question. It is the evidence of one Gerasinski, a clerk in that bank, that the lease was executed in his presence; that there were present at the time, Fleischmann and Hollander, who were officers of the Home Credit House, Inc., Goldman, one of their representatives and attorney, the complainant, and one Kagan; that the President asked him to put in the lease a security clause in case they should go bankrupt if the place should remain vacant; that \$2,000.00 was to stay in her possession; that he dictated that to a stenographer; that when the lease was finished, he just glanced at it, and told the persons present that he was inserting a clause in the rider; that they proceeded to sign it after they examined the lease; that the complainant looked it over, although he could not say that she read it; that as a matter of fact, the clause relating to the \$2,000.00 was left out.

The evidence of the complainant is that she went to the bank to have the lease entered into; that Ossowski wrote the lease; that Fleishmann, the President, said, "He says he is going to deposit \$2,000.00 in case they go bankrupt or they will not fulfill the lease, all the terms, that \$2,000.00 should be left in my possession for my losses;" that she said she agreed to that and wanted "to put that in the lease;" that she said to Ossowski, "That he should put that in the lease;" that at that time the lease and rider were drawn up by Ossowski. When asked, "Did you know at the time you signed the lease and the rider that that had been left out?" she answered, "No sir. She further testified that \$1800.00 of the \$2,000.00 was deposited with her by the Home Credit House, Inc.; that \$600.00 of it was paid to her at the time the lease was signed; that the Home Credit House, Inc. moved out of the premises in April or May, 1925. On cross-examination, she testified that she did not read the lease after it had been written by the scrivener before she signed it.

There was offered in evidence the deposition of one Fleischmann, who was president of the Home Credit House, Inc. He therein stated that he rented the place of business from the complainant on January 24, 1924.

It will be seen from the foregoing that the evidence concerning the alleged mistake is not only not clear and satisfactory, but very confusing, very ambiguous and altogether unconvincing.

Taking all the evidence for the complainant and analyzing it carefully, it would be found to be im-

The evidence of the complaint is that she went to the bank to have the lease entered into; that Ocasowski wrote the lease; that Fleischmann, the President, said, "He says he is going to deposit \$2,000.00 in case they go bankrupt or they will not fulfill the lease, all the terms, that \$2,000.00 should be left in my possession for my lease; that she said she agreed to that and wanted to put that in the lease;" that she said to Ocasowski, "That he should put that in the lease;" that at that time the lease and rider were drawn up by Ocasowski. When asked, "Did you know at the time you signed the lease and the rider that that had been left out?" she answered, "No sir. The further testified that \$100.00 of the \$2,000.00 was deposited with her by the Home Credit Bank; that \$100.00 of it was left to her at the time the lease was signed; that the Home Credit Bank, Inc. moved out of the premises in April or May, 1934. On cross-examination, she testified that she did not read the lease after it had been written by the receiver before she signed it.

There was offered in evidence the deposition of one Fleischmann, who was President of the Home Credit Bank, Inc. He therein stated that he leased the place of business from the complainant on January 24, 1934.

It will be seen from the foregoing that the evidence concerning the alleged mistake is not only not clear and satisfactory, but very confusing, very ambiguous and altogether unconvincing.

Taking all the evidence for the complaint and analyzing it carefully, it would be found to be im-

possible to make out sufficient to justify the conclusion that the parties, at the time the lease was drawn up, understood and intended to include therein any such clause as the complainant claims in her bill of complaint was part of the lease and part of the understanding at the time it was drawn up. Further, instead of the evidence for the complainant making out a clear and satisfactory case, it is, upon examination, not only ambiguous, ^{dictory} contra- and confusing, but lacking in plausibility. Further, the alleged mistake did not pertain to the substance of the transaction, that is, to the leasing of the property in question, but pertained only to the deposit of certain money as security. There was already in the lease a clause to the effect that \$2,000.00 was to be held as security for the performance of the terms of the lease; so that the omission of the disputed clause, that is, as to the possible bankruptcy of the lessee, did not affect, in reality, the substance of the transaction itself, which was the leasing of the premises. Hoops v. Fitzgerald, supra, Steinmeyer v. Schroepel, supra. Then, too, the evidence of the complainant is that after she signed the lease she noticed that Ossowski had not put in the disputed clause, and, yet, although that was in January, 1924, she made no complaint concerning the omission until nearly two years afterwards. Apparently, assuming what she testified to to be true, the matter appeared to her to be of very little, if any, importance.

No claim is made by the complainant that there was any fraud or misrepresentation in the matter, nor does she claim that she had no opportunity to obtain knowledge of the terms of the written lease. The evidence shows that the

possible to make out sufficient to justify the conclusion that the parties, at the time the lease was drawn up, understood and intended to include therein any such clause as the complaint claims in her bill of complaint was part of the lease and part of the understanding at the time it was drawn up. Further, instead of the evidence for the complaint making out a clear and satisfactory case, it is, upon examination, not only ambiguous, ^{history} contradictory and confusing, but lacking in plausibility. Further, the alleged mistake did not pertain to the substance of the transaction, that is, to the leasing of the property in question, but pertained only to the deposit of certain money as security. There was already in the lease a clause to the effect that \$2,000.00 was to be held as security for the performance of the terms of the lease; so that the omission of the disputed clause, that is, as to the possible description of the lease, did not affect, in reality, the substance of the transaction itself, which was the leasing of the premises. Boone v. Boone, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 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3875, 3876, 3877, 3878, 3879, 3880, 3881, 3882, 3883, 3884, 3885, 3886, 3887, 3888, 3889, 3890, 3891, 3892, 3893, 3894, 3895, 3896, 3897, 389

complainant is an educated woman, a graduate of the Dental School of the University of Illinois; that she had been practicing since 1903, and has a degree of D.D.S. from the University of Illinois.

Considering all the evidence, it is our judgment that there is no sufficient reason for this Court of Review to override the judgment of the Chancellor. He saw the witnesses and was far more advantageously situated to determine the matter correctly than we are; further, we think the Chancellor was entirely justified in denying the reformation of the instrument which the complainant sought.

It is contended on the part of the complainant that there is no evidence to support the finding in the decree that she served, or caused to be served, any notice in writing on the tenant, terminating the lease. That is answered, however, by a mere reference to the sworn allegations in her original bill, wherein she specifically states that such notice was served. In our judgment, the lease in question was terminated by the conduct of the complainant. The notice of the termination of the lease, which notice was served on May 2, 1925, was not served after the adjudication of bankruptcy, but before, and being served at that time, brought the lease to an end. Collier on Bankruptcy, 13th Ed. Vol. 2, p. 1638; Christopherson v. Harrington, 136 N. W. 289 (Minn.)

Objection is made that the trial judge erred in ruling out certain testimony in the deposition of Fleischmann. We find no errors in the rulings that were made.

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Dental School of the University of Illinois; that she had
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that there is no sufficient reason for this Court of Review
to override the judgment of the Chancellor. He saw the
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the relocation of the instrument which the complainant

it is contended on the part of the complainant
that there is no evidence to support the finding in the
deed that she served, or seemed to be served, any notice
in writing on the tenant, terminating the lease. That is
unanswered, however, by a mere reference to the sworn affi-
dations in her original bill, wherein she specifically
states that such notice was served. In our judgment, the
lease in question was terminated by the conduct of the
complainant. The notice of the termination of the lease,
which notice was served on May 8, 1923, was not served
after the adjournment of bankruptcy, but before, and
being served at that time, brought the lease to an end.
Collier on Bankruptcy, 15th Ed. Vol. 2, p. 1038; Garrett
Garrett v. Garrett, 122 N. W. 223 (Iowa).

Of course it is made that the trial judge erred in
ruling out certain testimony in the deposition of Fitch-
man. We find no errors in the rulings that were made.

Further, counsel for the complainant has not in any way pointed out any such alleged errors, and has submitted no argument on the subject.

As to the \$1800.00 deposited as security for the performance of the lease, it was provided that it should be a penalty. Advance Amusement Co. v. Franke, 268 Ill. 579.

The lease contains the following:

"It is specifically understood that said security shall not apply in payment of any rents, and the party of the first part hereby agrees to return to the party of the second part said sum * * * upon the termination of said lease."

The lease was terminated by complainant as lessor on May 22, 1925, when she served notices of termination, and there arose not only an implied promise to return that sum of money, but there was an express promise in the words of the lease that the amount should be returned.

For the reasons stated, the decree of the Chancellor will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

Further, counsel for the complainant has not in any way pointed out any such alleged errors, and has admitted no argument on the subject.

As to the \$1800.00 deposited as security for the performance of the lease, it was provided that it should be a penalty. Advocate Insurance Co. v. Frank, 208 Ill.

The lease contains the following:

"It is covenanted that the party of the first part hereby rents, and the party of the second part hereby agrees to return to the party of the second part said sum of \$1800.00 as security for the performance of the lease."

The lease was terminated by complainant as a lease on May 28, 1935, when she served notice of termination, and there arose not only an implied promise to return that sum of money, but there was an express promise in the words of the lease that the amount should be returned.

For the reasons stated, the decree of the

Chancellor will be affirmed.

APPROVED:

After the above

NOTICE AND WITNESS, J. J. CONCUR.

JOHN HENDRICKS, Administrator of the
Estate of Charles C. Hendricks,
Deceased,

Appellee,

v.

CHICAGO RAPID TRANSIT COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

STATEMENT OF THE CASE.

In this case there was a trial before court and jury which culminated in a verdict and judgment for \$10,000, and defendant brings the record here for review by appeal.

The declaration in this cause charges that on the 30th day of November, A. D. 1924, the defendant was operating an elevated railroad in the City of Chicago, as a carrier of passengers for hire; that it maintained a station on Western Avenue in said city, for the purpose of permitting persons to become passengers upon said railroad, and to furnish them a means of entrance to its trains; that on the day in question, plaintiff's intestate, Charles C. Hendricks, then and there entered the station of said defendant for the purpose of becoming a passenger, and thereupon one Luke E. Reesor, who was at the time an agent and ticket seller for the defendant, made an assault upon and shot plaintiff's intestate, with a certain pistol or revolver, and as a result the said Charles C. Hendricks was killed. The declaration further avers that said deceased left surviving him a widow, a father and a sister,

JOHN HENRIK, Administrator
of the Chicago Transit Authority,
Chicago, Illinois.

CHICAGO TRANSIT AUTHORITY

CHICAGO, ILLINOIS

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Opinion filed Feb. 23, 1938.

CHICAGO TRANSIT AUTHORITY

It is the opinion of the Board that the

Chicago Transit Authority is entitled to the same treatment as other public utilities in the State of Illinois.

On application in this case made by the

Chicago Transit Authority, it is ordered that the

Chicago Transit Authority be granted the same treatment as other public utilities in the State of Illinois.

A further order is made that the Chicago Transit Authority be granted the same treatment as other public utilities in the State of Illinois.

Station on Western Avenue in said city, for the purpose of

permitting persons to board passengers upon said railroad.

and to furnish them a means of entrance to its trains;

that on the day in question, plaintiff's interest, Chicago

O. Hendrick, then and there entered the station of said

defendant for the purpose of becoming a passenger, and

thereupon was slain by E. H. Hooten, who was at the time an agent

and acted solely for the defendant, upon an account upon

and that plaintiff's interest, with a certain pistol or

revolver, and as a result the said Charles O. Hendrick

was killed. The defendant further avers that said

defendant left surviving him a widow, a father and a sister.

as next of kin, and that they have been and are by reason of the death of said Charles G. Hendricks deprived of their means of support; claiming damages to the plaintiff, as administrator, in the sum of \$10,000.00.

To this declaration the defendant pleaded that on the day in question the plaintiff's intestate entered the said station of the defendant and with force and arms opened a drawer containing certain moneys of the defendant which was under the care and custody of its servant, Luke D. Reesor; and was at the time engaged in the act of robbery, and had the money of the defendant in his possession in the commission of said crime, and that when his action in this regard was discovered, the said plaintiff's intestate made an assault on the servant of said defendant, who thereupon defended himself and as a result of his defending himself the plaintiff's intestate was shot and killed; and that said Hendricks met his death as a result of his attempted crime.

The testimony in the case shows that the deceased was steady and industrious. At the time of his death he was living at the home of a Mrs. John Hundley, at 4833 Magnolia avenue, with his wife. At the time of the occurrence in question the deceased's wife was at her former home in Quincy, Illinois, and had been away for about two weeks. There was no eye witness to the occurrence except Reesor, the servant and ticket agent of the defendant, and that after the affair was over he was lying upon the floor of the station between the entrance and the booth used by the ticket agent for the purpose of selling tickets to those seeking transportation.

as part of his, and that they have been and are by reason
of the death of said William C. Hendon deprived of their
portion of property; claiming damages to the plaintiff, as
administrators, in the sum of \$10,000.00.

To this declaration the defendant pleaded that
on the day in question the plaintiff's interest entered
the said estate of the defendant and with force and arms
opened a drawer containing certain moneys of the defendant
which were under the care and custody of the defendant, James
B. Hendon; and was at the time engaged in the act of
robbery, and had the moneys of the defendant in his possession
in the commission of said crime, and that when his action
in this regard was discovered, the said plaintiff's interest
made an assault on the servant of said defendant, who there-
upon returned himself in a lawful manner, and killed and
killed the plaintiff's interest and shot and killed and
that the defendant was not in any way a party to the same.

The plaintiff in his answer, and in his
reply to the declaration, set forth that the defendant
lived at the house of a Mrs. John Hendon, at 4533 North
avenue, with his wife, at the time of the occurrence in
question the defendant's wife was at her former home in Quincy,
Illinois, and had been away for about two weeks. There was
no eye witness to the occurrence except Hendon, the servant
and night agent of the defendant, and that after the attack
was over he was lying upon the floor of the station between
the platform and the booth used by the ticket agent for the
purpose of selling tickets to those seeking transportation.

A. H. Dressel, a witness called on behalf of the plaintiff, testified that he was the president of the West Central State Bank; that he lived at 2311 Roosevelt Road; that at the time of the shooting he and his wife were walking north on Western avenue and were passing the elevated station; that he saw a man lying on the floor and another man putting an army overcoat over him, with a gun in his hand; that another man walked into the station and the witness followed him; that Reesor, the man with the gun, said: "What the hell do you fellows want? Get out of here or I'll give it to you, too"; that he was not near enough to testify whether he was intoxicated or not; that the man was evidently excited or something else, because he pointed the gun at him and used the words referred to; that the police then came up and he went in with them; that after the shot a couple of men and probably a couple of women came running out of the station, exclaiming that a man had been shot; that the ticket agent did not have a coat on when he first saw him but was in his shirt sleeves; and that he got his coat out of the office.

Thomas Condon, called as a witness on behalf of the plaintiff, testified that he was a captain of police in the city of Chicago, on November 30, 1934; that he got to the elevated station about six o'clock; that there was a considerable crowd of people; that a man was lying on the floor, dead; that there were several officers there; that he examined the body and found it had a bullet wound at the base of the nose, going right through the head; that he saw Reesor about six thirty o'clock and again about ten thirty that night; that he said he had

A. W. Henson, a witness called on behalf of the

plaintiff, testified that he was the president of the

West Central State Bank; that he lived at 2811 Broadway

and that at the time of the shooting he and his wife were

waiting north on Broadway and were passing the dis-

posed station; that he saw a man lying on the floor and another

man putting an army overcoat over him, with a gun in his

hand; that another man walked into the station and the wit-

ness followed him; that Henson, the man with the gun, said:

"What the hell do you fellows want? Get out of here or

I'll give it to you, son; that he was not angry;

he testified that he was interested or not; that the man

was evidently excited or something else, because he pointed

the gun at him and he was afraid; that after

police then came up and he went in with them; that after

he was a couple of men and probably a couple of women came

running out of the station, explaining that a man had been

shot; that the witness again did not have a seat on when he

lived and his seat was in his left sleeve; and that he

got his seat out of the car.

Thomas Gordon, called as a witness on behalf

of the plaintiff, testified that he was a member of

police in the city of St. Louis, on November 1, 1934; that

he got to the elevated station about six o'clock; that

there was a considerable crowd of people; that a man was

lying on the floor, dead; that there were several officers

there; that he examined the body and found it had a bullet

wound at the base of the neck, going right through the

head; that the man passed out at thirty o'clock and

again about ten thirty that night; that he said he had

had some liquor that day; that he took him to his home and got a bottle referred to by Reesor; that Reesor told him he got this bottle from some passenger that morning, out near Forest Park; and that he had had a drink before he went to work in the afternoon; that he examined the body of the man on the floor and did not find any weapons; and that, in his opinion, Reesor was intoxicated.

Walter Green, a police officer, called as a witness for the plaintiff, testified that he went to the station in question with officers Carroll, and Collopy; that Reesor at the time he saw him was intoxicated, and that he staggered and stuttered when he spoke. On cross-examination he testified that he did not remember whether on the criminal trial before Judge McGuerty in January 1925, he had said: "Well, I would not say he was drunk, but he smelled awful of liquor, and had been drinking;" that he believed the agent, Reesor, had a sweater jacket on at the time he got there; that he did not remember seeing any change on the floor when he was at the elevated station or that the cashier's cage "was tore about;" that there were men stooping down and picking up empty shells or something, but he did not remember whether they were picking up shells or change.

Agnes Peterson, a witness for the plaintiff, testified that on November 30, 1924, she was in the vicinity of the Garfield avenue elevated station when she saw a man standing with a gun in his hand, and he fired one shot, then another and by the time she got out he had fired three or four more shots; that at the time of the last

[illegible]

three or four more about that at the time of the last shot, then another and by the time she got out he had a gun sticking into a gun in his hand, and he fixed one tip of the British woman's elevated station when she saw something that on November 10, 1935, she was in the village of Agona, Tabora, a witness for the British.

three or four shots she was outside of the station, and she would judge there had been five or six shots fired; that the man who was shooting was standing facing south-east and she could see his profile; that he had a gun in his ^{right} hand; that she did not know where his left hand was; that he shot down at an angle and she did not hear anyone speaking.

Helen Beatty, another witness for the plaintiff, testified that she worked in a loop department store and lived at 2410 Congress street; that she was in the station about five o'clock that afternoon and had a conversation with the ticket agent; that the agent was Reesor; that when she went to purchase a ticket he asked her if she used tickets very much; that he seemed to be under the influence of liquor and tried to strike up a conversation with her; that he told her he would sell her a pass, which he did, and for which she paid \$1.25; that he then suggested that she get a position with the elevated road and then said: "You are a spotter, are you?"; that he then came out of the cage and took hold of her arm, and brought her around the cage and showed her a gun which was lying on a shelf; that he told her he was working for the railroad as a detective and was working on robbery cases; and that the company had sent him around to see about the hold-ups.

James Duffy, a witness called on behalf of the defendant, testified that he was a police officer; that he knew Reesor and had seen him at the police station on the night of November 30, 1924; that there was nothing about his appearance that indicated he had been drinking.

three or four shots and was outside of the station, and she would judge there had been five or six shots fired; that the man who was shooting was standing facing south-east and she could see his profile; that he had a gun in his right hand; that she did not know where his left hand was; that he shot down at an angle and she did not hear any one

William Henry, another witness for the plaintiff, testified that she worked in a food department store and lived at 3410 G Street; that she was in the station about five o'clock that afternoon and had a conversation with the ticket agent; that the agent was Negro; that

used tickets very much; that he seemed to be under the influence of liquor and tried to strike up a conversation with her; that he told her he would sell her a pass, which he did, and for which she paid \$1.25; that he then suggested that she get a position with the elevated road and then said: "You are a quitter, are you?" that he then came out of the cage and took hold of her arm, and brought her around the cage and showed her a gun which was lying on a shelf; that he told her he was working for the railroad as a detective and was working on robbery cases; and that the company had sent him around to see about the hold-up.

James Kelly, a witness called on behalf of the defendant, testified that he was a police officer; that he was present and had seen him at the police station on the night of November 30, 1934; that there was nothing about his appearance that indicated he had been drinking.

Sabina Loftus, a witness for the defendant, testified that she was an operator for the Chicago Rapid Transit Company and knew Reesor; that on Sunday evening, November 30, 1934, she received a message from him stating that he had shot a hold-up man; that he called her again later and asked her if she had called the police; and that, over the telephone, he appeared to be sober.

Sarah Delaney, for the defendant, testified that she was a ticket agent for the Transit Company; that she was relieved by Reesor about three o'clock on the afternoon in question; that she talked with him and turned over the money in the safe to him, and also the tickets; that to her, there was nothing to indicate that he had been drinking or was intoxicated.

Nels P. Hansen, a witness for the defendant, testified that he was a supervisor for the Chicago Rapid Transit Company; that he proceeded to the Western avenue station when he heard of the shooting, and arrived there around 5:45; that he saw Reesor and he was sober; that Reesor asked the witness to call his wife and tell her where he was; that when he arrived at the station he found some tickets and change scattered about inside the booth, which was picked up by the police officer and handed to the agent.

Arthur R. Metz, witness for the defendant, testified that he was a resident surgeon of the Washington Boulevard Hospital; that he went over to the station and heard Reesor tell his story, and that, in his opinion, he was not intoxicated.

William Johnson, a witness for the defendant, testified that she was an operator for the United Fruit Transit Company and knew Hester; that on Monday evening, November 30, 1934, she received a message from him stating that he had shot a hold-up man; that he called her again later and asked her if she had called the police; and that, over the telephone, he appeared to be sober.

Raymond Johnson, for the defendant, testified that she was a sales agent for the Transit Company; that she was relieved by Hester about three o'clock on the afternoon in question; that she talked with him and turned over the money in the safe to him, and also the tickets; that so far, there was nothing to indicate that he had been drinking or was intoxicated.

John E. Hansen, a witness for the defendant, testified that he was a chauffeur for the United Fruit Transit Company; that he proceeded to the western avenue station upon the receipt of the shooting and arrived there around 8:45; that he saw Hester and he was sober; that Hester asked the witness to call his wife and tell her where he was; that when he arrived at the station he found some tickets and change scattered about inside the booth; which was picked up by the police officer and handed to the agent.

Arthur E. Hester, witness for the defendant, testified that he was a resident surgeon of the Washington Hospital; that he went over to the station and heard Hester tell the story, and that, in his opinion, he was not intoxicated.

Timothy W. Casey, a police officer for the defendant Company, testified that when he got to the station, Reesor was standing at the end of the ticket booth and the deceased was lying on the floor, with his head towards the end of the booth and his feet out towards the entrance door; that there were papers and money on the floor of the booth; and that, in his opinion, Reesor was sober.

Louis Beal, testified that he was road dispatcher for the elevated railroad; that he went to the station in question and asked the agent what was wrong and was told that he had just shot a hold-up man; that he asked him how the trouble came about and he answered: "I was downstairs fixing the fire and I heard footsteps upstairs, and as I came up to investigate I found this man in the booth"; that it looked to him as if there had been a scuffle in the booth; that the money drawers were open; and that the agent appeared to be sober. To the same effect was the testimony of another of the defendant's witnesses, Charles H. Lobert.

Mrs. Mary Reesor, the wife of the agent, Luke D. Reesor, testified that they lived at 2611 West Harrison Street; that her mother lived with her; that she and Mr. Reesor had a drink just before dinner; and that there was no other liquor in the house, except the liquor in the bottle the police obtained.

Luke D. Reesor, a witness called on behalf of the defendant testified that he was forty-five years of age; that he had lived in Chicago since 1910; that during the

Timothy W. Geary, a police officer for the

Metropolitan Police, testified that when he was in the

station, Geary was standing at the end of the street

and the deceased was lying on the floor, with his

head toward the end of the street and his feet out

toward the entrance door; that there were papers and money

on the floor of the booth; and that, in his opinion,

Geary was sober.

John J. Geary, testified that he was with Geary

for the above mentioned railroad; that he went to the station in

company and asked the agent what was wrong and was told

that he had just shot a hold-up man; that he asked him how

the trouble came and he answered: "I was down at the

train the first and I heard footsteps, stopped, and as I

was about to turn around I found this man in the booth; that

it looked to him as if there had been a struggle in the

booth; that the money drawers were open; and that the

agent appeared to be sober. In the same witness was the

testimony of members of the defendant's witness, Charles

W. Geary.

Mrs. Mary Geary, the wife of the agent, testified

that they lived at 2511 West Madison

street; that her mother lived with her; that she and Mr.

Geary had a drink just before dinner; and that there

was no other in the house, except the agent in the

middle the police obtained.

John A. Geary, a witness called on behalf of the

defendant testified that he was forty-five years of age;

that he had lived in Chicago since 1910; that during the

World War he was connected with the United States Army on the Mexican border; that he had served in the Navy four years and was in the marine corps four years; that he had worked for a time for the Post Office Department in Chicago since the World War; that he was a ticket agent for the elevated road since June, 1934; that he had no regular station but was assigned to different stations from time to time; that on the night of November 30, (the Saturday preceding the day in question), he had worked at the Des-plaines Avenue station; that after he had completed his work, a man had come through the station and asked him if he wanted a drink, and handed him a small bottle partly filled with liquor, and told him to keep it; that he judged he was a trainman; that he only had two drinks on the day in question, the last one being between two and three o'clock - he thought it was a little after two -; that he reported for duty at the Western Avenue Station in the afternoon; that they kept about \$15.00 at the station; that when he went to relieve the other agent, he signed her report and compared it with the money and tickets on hand; that he did not know Charles C. Hendricks, the deceased, but that he saw him about 5:20 or 5:30 o'clock; that he, the witness, was in the ticket booth at the time and observed a man at the corner of the booth, stooping down, and that as he raised up he threw a one ride ticket through the window; that it went on the floor and he remarked to the man that he did not need to throw his ticket at him, and the man said he would come around and pick it up but that he told him never mind he would pick it up himself; that Hendricks appeared to be under the influence of liquor and used

would say he was connected with the United States Army or
 the National Guard; that he had served in the Army four
 years and was in the Army four years; that he had
 worked for a time for the Post Office Department in Chicago
 since the United Way; that he was a ticket agent for the
 elevated road since June, 1934; that he had no regular
 station but was assigned to different stations from time
 to time; that on the night of November 22, (the Saturday
 preceding the day in question), he had worked at the De-
 cision Avenue station; that after he had completed his
 work, he had come through the station and asked him
 if he wanted a drink, and handed him a small bottle partly
 filled with liquor, and told him to keep it; that he judged
 he was a drunk; that he only had two drinks on the day
 in question, the last one being between two and three
 o'clock - he thought it was a little after two - that he
 reported for duty at the Decision Avenue station in the
 afternoon; that when he saw him about 5:30 at the station; that
 when he went to relieve the other agent, he signed for the
 post and compared it with the money and tickets on hand;
 that he did not know Charles E. Handwerker, the deceased;
 but that he saw him about 8:30 or 9:30 o'clock; that he,
 the witness, was in the street near the time and observed
 a man at the corner of the street, stepping down, and that as
 he raised up he threw a one ride ticket through the window;
 that it went on the floor and he requested to the man that
 he did not need to throw his ticket at him, and the man
 said he would come around and pick it up but that he told
 him never mind he would pick it up himself; that Handwerker
 appeared to be under the influence of liquor and was

abusive language, and said: "You are a lot of bums working for a millionaire company;" that a lady came through just then and he asked Hendricks to step around to the east side of the booth; that she asked him about an Aurora and Elgin train and that he "butted into the conversation", and the witness told him he was directing the lady; that he walked around the booth and "I turned to close the door leading into the booth, but I observed his hand was on the door and I could not close the booth;" that a train came and he told him it was his train; that he, Hendricks, walked through the door leading toward the train; that he observed there was no one in the station; that it was customary for the station agent to tend the furnace; that he had an automatic pistol in the booth, and that he picked it up and put it in a holster that he had on, and started to the furnace which was in the basement; that when he got to the last step leading into the furnace room, he heard someone walking over the floor above his head; that when he ran back he observed a man in the booth at the money drawer; that he asked him what he was doing; that he lifted his left hand in which he had some paper money, and said: "I am going to take these and ride. . . I said, You will, like hell, and I stepped in the booth. " * * he struck at me with his left hand, " * * I reached under my sweater for my gun and in some manner, I do not know just how, my gun caught in the holster, " * * I discharged a couple of shots from my gun in getting it out;" that the man had his right hand in his hip pocket and was "coming towards^{me}"; that he fired a shot or two at his legs and ran back as far as he could towards the west side of the building; that he was sure he had struck him in the leg, and he asked

that he was sure he had struck him in the leg, and he asked
back as far as he could towards the west side of the building,
saw that he had a shock or two at his legs and arms.
man had his right hand in his hip pocket and was "working"
couple of minutes then he came in. "What is it?" said the
man, "you caught in the net?" "No," he answered. "I
my sweater for my gun that in some manner I do not know how
he arrived at me with the left hand." "I repeated what
said, "You will, like hell," and I answered in the pocket.
money, and said, "I am going to take these and ride. I
that he lifted his left hand in which he had some paper
of the money drawer; that he asked him what he was doing
his hand; that when he was asked he observed a man in the pocket
Lynchman took, he heard someone was taking over the floor above
money; that when he got to the last step looking into the
a foot on, and started to the furnace which was in the back-
pocket, and that he picked it up and put it in a holster that
to find the furnace; that he had an automatic pistol in the
in the session; that it was necessary for the reason against
looking around the house; that he observed there was no one
and his family; that he, when he walked through the door
and also the money; that a train came and he told him it
pocket, but I observed his hand was in the door and I could
the pocket and "I turned so close to the door leading into the
told him he was detecting the lady; that he walked around
and that he "waited into the conversation," and the witness
the money; that she asked him about the money and the train
and was in the house.

him if he would stop; that he said "no", and as he was backing towards the entrance of the station, the man made another lunge at him and he fired again and the man dropped.

On cross-examination he stated that he had worked for John J. Mitchell, at Lake Geneva, that is, he had worked for contractors on different estates, including Mr. Mitchell's; that the furnace referred to was located right at the foot of the stairs, in the basement, (from the plat, the stairs leading to the basement seem to be some distance from the booth and near to the entrance to the trains,); that it was about ten feet from the foot of the stairs to the furnace; that he did not do anything to the furnace; that he left the door to the booth unlocked; that there was a porter who cleaned out the furnace but he did not know whether he came several times during the day or not, to take care of it; that some times these porters worked at the stations in the afternoon, and at some stations in the forenoon; that he could not state whether or not he was in the door of the cage when he pulled his gun, or was entirely outside; that he knew how to use a gun; that he kept backing away from Hendricks, and was nearly over to the wall; that Hendricks followed him, cursing; that he did not see the bills in his hand at that time but that he must have had them because he saw them there, when he was in the booth; that he shot him before he got to the wall but that he kept right on coming toward him; that he thought he fired two shots accidentally, when he was pulling the gun from the holster; that he was afraid the man was going to shoot him because he had his hand in his hip pocket; that he took the money out of the man's hand after he fell.

him it he would have said "no", and as he was
 looking towards the entrance of the station, the man made
 another lunge at him and he lifted again and the man dropped.
 Of course examination he stated that he had worked
 for John J. Mahoney, at Lake Geneva, that is, he had worked
 for some years on different estates, including Mr. Mahoney's.
 That is, Mahoney, he was called right at the time
 of the attack on Mahoney. Then he said, the man
 leading to the basement seem to be some 15 years from the
 fact that he was 40 years of age, that is, that he
 was about ten feet from the foot of the stairs to the basement;
 that he did not do anything to the basement; that he left the
 door to the booth unlocked; that there was a porter who
 cleaned out the basement but he did not know whether he came
 several times during the day or not, to take care of it;
 that some times these porters worked at the station in the
 afternoon, and at some stations in the forenoon; that he
 could not state whether or not he was in the door of the cage
 when he pulled the gun, or was entirely outside; that he knew
 how to use a gun; that he kept backing away from Mahoney, and
 was nearly over to the wall; that Mahoney followed him, curs-
 ing; that he did not see the bill in his hand at that time
 but that he must have had them because he saw them there,
 when he was in the booth; that he shot him before he got to the
 wall but that he kept right on coming toward him; that he
 thought he liked two shots considerably, when he was pulling
 the gun from the holster; that he was afraid the man was
 going to shoot him because he had his hand in his hip pocket;
 that he took the money out of the man's hand after he fell.

and took it back to the booth and put it in with the other money.

Dr. James Whitney Hall, a witness called for the defendant, testified that he was a physician and had graduated from Georgetown, and had received his medical degree from the University of Kentucky; that ordinarily, a dose of whiskey is supposed to disappear entirely within an hour, and that one drink of liquor at two o'clock should not have any effect by five o'clock in the afternoon. He stated that there is a great difference between whiskey and moonshine.

John Dowd, called as a witness for the defendant, testified that he was a porter for the elevated railroad; that he had four stations to take care of; that he had been at the Western avenue station at about five o'clock; that he talked with Reesor; that he did not appear to be drunk or abnormal. He also described the lights at the station.

The testimony of Officer Green, taken at the coroner's inquest, was read in behalf of the defendant for the purpose of impeachment. From that testimony it would appear that Officer Green had stated that he smelled liquor, but could not say that Reesor was intoxicated, and that he did not stagger or fall around.

MR. JUSTICE HOLDEN delivered the opinion of the court.

While we do not hold that there was error in the admission of the foregoing evidence, yet, as the judgment must be reversed for errors in procedure and there must be another

Dr. James McIntyre said, a witness called for the defendant, testified that he was a physician and had graduated from Georgetown, and had received his medical degree from the University of Kentucky; that ordinarily a dose of whiskey is supposed to disappear entirely within an hour, and that one drink of liquor at two o'clock should not have any effect by five o'clock in the afternoon. He stated that there is a great difference between whiskey and moonshine.

John Bond, called as a witness for the defense, testified that he was a waiter for the defendant's room; that he had four occasions to take care of; that he had been at the Western Union station at about five o'clock that he talked with Ramsey; that he did not appear to be in any abnormal. He also described the lights at the station.

The testimony of Officer Green, taken as the Government's interest, was read in detail at the defendant for the purpose of impeachment. From that testimony it would appear that Officer Green had stated that he called Nixon, but could not say that Hoover was interested, and that he did not know of any other persons.

the court.

While we do not hold that there was error in the admission of the foregoing evidence, yet, on the judgment

There are four events has exhibited in states of behavior in man

another trial, we do not decide any question regarding its probative force.

As a guide to the court on a retrial of this cause it may not be inappropriate to point out that defendant seeks to avoid responsibility for the death of plaintiff's intestate by making a defense under the second plea claiming that deceased at the time he met his death was engaged in committing a crime, viz., robbing the ticket booth of defendant of some of its money, and that its servant shot deceased in an endeavor to protect not only the property of defendant but his own life. This is an affirmative issue which casts upon defendant the burden of proving the alleged crime by evidence sufficient to convince a jury that deceased was guilty of such attempted crime beyond all reasonable doubt. A preponderance of evidence on this phase of the case is not sufficient to meet legal requirement. In Hest v. Noble & Co., 316 Ill. 357, the court said inter alia:

" * * the case is founded upon a criminal offense which is charged in the pleadings and must be established by the evidence to maintain the cause of action, and that the measure of evidence required in Illinois when a criminal offense is charged in the pleadings and must be shown to establish the cause of action or defense is such as removes every reasonable doubt of guilt. This rule, which has prevailed from very early in the history of the State, has been consistently adhered to and frequently announced, except in actions of slander or libel, in which it is provided by chapter 126 of the Revised Statutes of 1874 that it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of the testimony. (Grandall v. Dawson, 1 Gil. 556; Darling v. Banks, 14 Ill. 46; McConnel v. Delaware Mutual Safety Ins. Co. 18 id. 228; Harbison v. Shook, 41 id. 141; Sprague v. Dodge, 48 id. 142; Germania Fire Ins. Co. v. Klewer,

[illegible]

and necessary avoid responsibility for the death of plaintiff's intestate by making a defense under the second phase of the case. It may not be inappropriate to point out that defendant's testimony is not credible and that the jury should be instructed to disregard it. It is also suggested that the jury be instructed that the fact that defendant was guilty of such a heinous crime does not make him a person of good character and that the jury should be instructed to disregard any evidence of his good character. It is also suggested that the jury be instructed that the fact that defendant was guilty of such a heinous crime does not make him a person of good character and that the jury should be instructed to disregard any evidence of his good character. It is also suggested that the jury be instructed that the fact that defendant was guilty of such a heinous crime does not make him a person of good character and that the jury should be instructed to disregard any evidence of his good character.

[illegible]

123 id. 599; Grimes v. Hilliary, 150 id. 141; People v. Sullivan, 218 id. 419; McInturff v. Insurance Co. of North America, 248 id. 93; Oliver v. Ross, 269 id. 624)."

The declaration contains the following averment:

"And the plaintiff avers, that the said Charles C. Hendricks, left surviving him one Forest Hendricks, his widow, and one John Hendricks, the plaintiff, his father, and one Flossie Stolberg, his sister and next of kin, who are still living and by reason of the death of the said Charles C. Hendricks, the said Forest Hendricks, John Hendricks and Flossie Stolberg have been and are deprived of their means of support."

There was evidence showing that the deceased left as his next of kin his widow Forest Hendricks, his father John Hendricks, and his sister Flossie Stolberg, and as appears from the averment of the declaration above quoted, they by the death of deceased "have been and are deprived of their means of support." There is no evidence in the record that deceased ever contributed one dollar to the support of either his father or his sister at any time. As to his widow there is a presumption of law, which required no evidence to support, that she was dependent upon him for support, and there being no evidence to the contrary, it is assumed that he did support her during the time she was his wife.

The judgment of \$10,000 is the maximum amount allowed by statute. Did the jury award that sum because there were three persons who had lost their support in the death of the plaintiff's intestate? We are unable to say - but it stands to reason that the jury would in all probability allow more for three dependents than they would for one. The verdict may be regarded as assessing

the damages of the three, two of whom were not shown to be dependent upon deceased in the slightest degree. While it may be that the amount of the judgment might properly be paid alone to the widow, that will not cure the defect in the proof that neither the father nor sister were dependent, and therefore were not entitled to be included in the damages awarded. Furthermore there is proof in the record that the widow during her married life was self-supporting, and that she worked and earned wages. Under the evidence in this record the father and sister of decedent should have been eliminated from the case as dependents upon the deceased for their support, or the alleged fact of dependency should have been supported by proof of that fact, if fact it was.

It was error to admit evidence that the wages of lathers in Chicago were \$15 a day, in view of the absence of any evidence that he ever worked as a lather in Chicago or anywhere else, or ever earned \$15 a day or any other sum as a lather. Such evidence was misleading and calculated to mislead the jury in believing that he earned \$15 a day as a lather.

For the foregoing errors of procedure the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, F.J. CONCURS;
WILSON, J. DISSENTS.

the language of the three, two of them were not shown to be
dependent upon deceased in the slightest degree. While it
may be that the amount of the judgment might properly be paid
alone to the widow, that will not cure the defect in the proof
that neither the father nor sister were dependent, and there-
fore were not entitled to be included in the damages awarded.
It is manifest there is proof in the record that the widow during
her married life was self-supporting, and that she worked
for her support. Under the evidence in this record the
father and sister of deceased should have been eliminated
from the case as dependents upon the deceased for their
support, or the alleged fact of dependency should have been
supported by proof of that fact, if fact it was.

It is also manifest that the father and sister of deceased
were not dependent upon the deceased for their support, and
of any evidence that he ever worked as a laborer in Illinois
or anywhere else, or ever earned his a day or any other sum
as a laborer, such evidence was misleadingly and calculated
to mislead the jury in believing that he earned his a
day as a laborer.

For the foregoing errors of procedure the
judgment of the Circuit Court is reversed and the cause
remanded for a new trial.

REVEREND AND HONORABLE

TAYLOR, J. C. CLERK
WISBACH, J. CLERK

159 - 33100

THOMAS PADDEN and WILLIAM PADDEN,)
doing business as Padden Bros.,)

Appellees,)

v.)

WILLIAM RAPPALL,)

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. JUSTICE HOLDOM delivered the opinion of
the court.

This is an action brought by the plaintiffs
against the defendant for commissions claimed to be due
them as agents for the defendant in selling certain real
estate and the improvement thereon known as Nos. 2907 -
2909 Logan Boulevard, Chicago.

An appropriate declaration was filed to which
defendant interposed a plea of the general issue. The
case has been before three juries. On March 26, 1926,
because plaintiffs were unable to give the requisite
evidence that they were licensed real estate agents in
Chicago, a juror was withdrawn, and the cause continued.
On January 21, 1927, the case again came on for trial be-
fore a jury, and on the 24th of January, 1927, a verdict
was rendered by the jury finding the issues for the plain-
tiffs, and damages were assessed at \$1800. Defendant
moved for a new trial, and on February 28, 1927, the motion
for a new trial was granted, and on the same day, evidently

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

Opinion filed Feb. 28, 1981

[illegible]

[Faint, illegible text]

5. Explain the importance of the following factors in the development of a country:

[Faint, illegible text]

...and the ...

SECRET

7/30/68 I've "yab" some & sold me home, between now for last year - yes

by inadvertence, the suit was dismissed for want of prosecution, and on March 14, 1927, the order of dismissal was on motion vacated. On that day the cause came on for trial before the court and another jury, and on the next day the jury found the issues for the plaintiffs and assessed their damages at the sum of \$1800. On April 27, 1927, defendant's motion for a new trial was overruled and likewise his motion in arrest of judgment, and judgment entered upon the verdict for \$1800 and costs, and defendant brings the record to this court for review.

No errors involving the pleadings or the instructions of the court to the jury are argued by defendant. Therefore those questions are waived.

It is argued for reversal, however, that the verdict and judgment are against the weight of the evidence, and that there are errors in the trial court's rulings upon the evidence and the law.

On a careful reading of the evidence there is not disclosed to us any reversible rulings of the trial court in either the admission or rejection of evidence upon the trial. Before this court has the right, as distinguished from the power, to reverse the judgment on questions of fact, it must be able to say that the verdict of the jury is contrary to the greater weight of the evidence. In the face of the fact that two juries, upon virtually the same evidence, have come to the same conclusion in their separate verdicts and have assessed plaintiff's damages at the sum of \$1800 in each, and after a careful perusal of the evidence in the record, having in mind likewise the findings of the jury in

by intervention, the suit was dismissed for want of proper notice, and on March 14, 1937, the order of dismissal was entered. On that day the cause came on for trial before the court and another jury, and on the next day the jury found the issues for the plaintiff and assessed their damages at the sum of \$1500. On April 27, 1937, defendant's motion for a new trial was overruled and likewise his motion in arrest of judgment, and judgment entered upon the verdict for \$1500 and costs, and defendant brings this record to this court for review.

No error involving the pleading or the instructions of the court to the jury are argued by defendant. Therefore those questions are waived.

It is argued for reversal, however, that the verdict and judgment are against the weight of the evidence, and that there are errors in the trial court's rulings upon the evidence and the law.

On a careful reading of the evidence there is not disclosed to us any reversible rulings of the trial court in either the admission or rejection of evidence upon the trial. Before this court has the right, as distinguished from the power, to reverse the judgment on questions of fact, it must be able to say that the verdict of the jury is contrary to the greater weight of the evidence. In the two cases at the last that two juries, upon virtually the same evidence, have come to the same conclusion in their separate verdicts and have assessed plaintiff's damages at the sum of \$1500 in each, and after a careful perusal of the evidence in the record, having in mind likewise the findings of the jury in

each of the aforesaid trials, we cannot say that the verdict in the appeal before us for review is manifestly against the preponderating force of the evidence. On the other hand, we are entirely in accord with the jury's findings in this record. The findings of the jurors on the questions of fact are not to be lightly disregarded. The special province of the jury is to find and determine facts in the case. Therefore the judgment will not be reversed on any of the questions of fact determined by the jury, as shown in the record before us.

We think the legal situation of this case is substantially covered by the holding in Fox v. Ryan, 240 Ill. 391, where the court said:

"Where a broker is employed to sell property by the owner, if he produces a purchaser within the time limited by his authority who is ready, willing and able to purchase the property upon the terms proposed by the seller he is entitled to his commissions, even though the seller refuses to perform the contract on his part. * * * If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and in binding form offers to purchase upon the proposed terms."

There are many cases in the Supreme and this court holding to the same effect. The plaintiffs were employed by defendant, as real estate brokers, to sell his property above described, and they fulfilled all of the duties required by law by accepting such employment and in producing a purchaser ready, able and willing to buy the property at the price at which plaintiffs were authorized to sell the same. The failure to avail thereof is entirely chargeable to defendant. Plaintiffs as real estate agents earned their

each of the witnesses, we cannot say that the verdict
is the result of a conscious effort to reach a
preconceived notion of the evidence. On the other
hand, we are entirely in accord with the jury's finding in
this regard. The findings of the jury on the question
of fact are not to be lightly disregarded. The special
verdict of the jury is to find and determine facts in
the case, therefore the judgment will not be reversed
on any of the questions of fact determined by the jury,
as shown in the record before us.

We think the legal situation of this case is amply
adequately covered by the holding in Wyn v. Wyn, 240 U.S.
261, where the court said:

"Where a broker is employed to sell property
for the owner, if he procures a purchaser within the
time limited by his authority and is ready, willing
and able to purchase the property upon the terms pro-
posed by the seller he is entitled to his commission,
even though the seller refuses to perform the contract
on his part. * * * If, after the making of such a
contract, even though execution is lost, the purchaser
declines to complete the sale and the seller refuses to
perform, the broker is entitled to his commission, he has done all that he can do
to procure a party who is able, and in doing
so he has done all that he is bound to do."
This case is pertinent upon the proposed return."

There are many cases in the Supreme and this court
holding to the same effect. The plaintiffs were employed
by defendant, as real estate brokers, to sell his property
above described, and they fulfilled all of the duties re-
quired by law in executing such employment and in procuring
a purchaser ready, able and willing to pay the property at
the price at which plaintiffs were authorized to sell the
same. The failure to carry through to a sale of the property
described, plaintiffs as real estate agents caused their

commission.

There is no error in the rulings of the court upon the law or facts, and therefore the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

1870

Received of the undersigned the sum of £100

for the purchase of the land

situated at

the corner of the road

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of the land of the

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177 - 32118

POLOMIA KUNDROTAS,

Appellant,

v.

MAMIE MICERKA,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. JUSTICE HOLCOM delivered the opinion of the court.

This is an action on the case for assault and battery. Both plaintiff and defendant are women and apparently from their names of the same national origin. There was a trial before court and jury, and a verdict of guilty with damages assessed at \$750, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment, and defendant brings the record here for review by appeal.

There was a two count declaration, the first of which charged that defendant on July 22, 1925, assaulted plaintiff by pulling her hair and striking her with her fists, and kicking her; that defendant damaged her dress of the value of \$50, and that as a result of such assault plaintiff was prevented from performing her usual household duties, and necessarily laid out and paid the sum of \$300 in an effort to cure her bruises and other injuries occasioned by such assault. The second count charges a general assault on the same day. Defendant pleaded

230

177 - 1818

WOLFEHUTTEN, WOLFEHUTTEN

Appellant

ATTORNEY AT LAW

SUPERIOR COURT

COOK COUNTY

WOLFEHUTTEN, WOLFEHUTTEN

WOLFEHUTTEN, WOLFEHUTTEN

Appellee

Opinion filed Feb. 28, 1938.

MR. JUSTICE WOLFEHUTTEN delivered the opinion of

the court.

This is an action on the case for assault and battery. Both plaintiff and defendant are women and apparently from their names of the same national origin. There was a trial before court and jury, and a verdict of guilty with damages assessed at \$750, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment, and defendant brings the record here for review by appeal.

There was a two count declaration, the first of which charged that defendant on July 22, 1935, assaulted plaintiff by pulling her hair and striking her with her fists, and kicking her; that defendant damaged her dress of the value of \$50, and that as a result of such assault plaintiff was prevented from performing her usual house hold duties, and necessarily laid out and paid the sum of \$500 in an effort to cure her bruises and other injuries occasioned by such assault. The second count charges a general assault on the same day. Defendant pleaded

the general issue and son assault demeanor and a replication de injuria was filed to the second plea.

Dr. Charles K. Barnes, plaintiff's medical attendant, testified as to the extent of her injuries. On the day of the occurrence he visited her in the Auburn Park Hospital, and upon examination of her person found her to be suffering from shock and daze and a laceration about two or three inches long and one side of her face was greatly swollen. She also had an "enlargement of blood" (whatever that means) about the size of the doctor's fist; that she was black and blue over her head above her eyes with minor bruises on her left shoulder; that she was scratched up in places; that after being treated for her objective injuries and shock she was taken to her home; that she remained in bed under medical treatment for five weeks; that she "developed numerous infections"; that she complained of dizziness and severe pains and "had headache", and that ten days before the trial he was treating her for the foregoing subjective symptoms; that she had a marked weakness in her left foot and that the pupils of her eyes were slightly enlarged. The medical man also testified that one hand seemed to be weaker than the other.

The plaintiff testified that defendant, without provocation on her part, while she was returning from her garden in the rear ^{of} premises at 81st and Vincennes avenue, Chicago, struck her over the head with a stick, called her a whore and threatened to kill her, and that from the effect of such striking she became unconscious. There was some corroboration to this testimony. According to the testimony

the general nature and general character and a description of the injury was filed to the second place.

Dr. Charles K. Warren, District Medical Examiner, testified as to the extent of her injuries. On the day of the occurrence he visited her in the Auburn Park Hospital, and upon examination of her person found her to be suffering from shock and lacerations about the face and neck, and also long and one side of her face was greatly swollen. She also had an "enlargement of blood" (whatever that means) about the size of the doctor's fist; that she was black and blue over her head above her eyes with minor bruises on her left shoulder; that she was somewhat up in places; that after being treated for her objective injuries and shock she was taken to her home; that she remained in bed under medical treatment for five weeks; that she developed numerous infections; that she complained of dizziness and severe pains and "bad headaches", and that ten days before the trial he was treating her for the foregoing subjective symptoms; that she had a marked weakness in her left foot and that the pupils of her eyes were slightly enlarged. The medical man also testified that one hand seemed to be weaker than the other.

The District Medical Examiner testified that defendant, without provocation or on her part, while she was returning from her garden in the rear premises of 121st and Wisconsin avenues, Chicago, struck her over the head with a stick, which he testified was a piece of wood, and that from the effect of such striking she suffered concussion. There was some contribution to this testimony.

of other witnesses plaintiff and defendant engaged in a fist fight, and that plaintiff's husband said, "see which one is the best fighter, fight it out." Another witness swore that plaintiff hit defendant on her nose. According to one witness the fight continued ten minutes, and he left before the end of the fight. It was in evidence that plaintiff's husband encouraged the fight and at times assisted in it. This however he denied.

Defendant urges for reversal errors in procedure and in the giving of instructions, and in refusing to grant a new trial. The evidence is of an extremely contradictory character, which made it peculiarly the province of the jury to solve these apparent contradictions in the testimony. The jury have the advantage not possessed by this court of seeing the several witnesses and observing their demeanor upon the witness stand, their manner of testifying their apparent candor or lack of it, and therefore are better able than we are to judge the credibility of the witnesses and to solve the disputes in the testimony of such witnesses.

It is the law that if the testimony of plaintiff standing alone and uncontradicted is sufficient to sustain the verdict, that this court will not disturb the judgment entered thereon, unless it can say from all the evidence, that the verdict is contrary to the probative force of the evidence as a whole. It is our opinion that the evidence of the plaintiff was amply sufficient to sustain the verdict of the jury in her favor, and while the evidence of defendant

of other witnesses plaintiff and defendant engaged in a
the light, and that plaintiff's husband said, "see which
one is the best light, light it out." Another witness
swore that plaintiff's husband on her home, according
to one witness the light contained ten minutes, and he
left before the end of the light. It was in evidence
that plaintiff's husband encouraged the fight and at
times assisted in it. This however he denied. The jury
concluded on the facts that plaintiff's husband was the aggressor
and in the giving of instructions, and in refusing to
grant a new trial. The evidence in an extremely com-
plex character, which made it peculiarly the province
of the jury to solve these apparent contradictions in the
testimony. The jury have the advantage not possessed by
this court of seeing the several witnesses and observing
their demeanor upon the witness stand, their manner of
testifying their apparent candor or lack of it, and there-
fore are better able than we are to judge the credibility
of the witnesses and to solve the disputes in the testimony
of each witness.

It is the law that if the testimony of plaintiff
standing alone and uncontradicted is sufficient to sustain
the verdict, that this court will not disturb the judgment
entered thereon, unless it can say, "removal of the
fact the verdict is necessary to the operative force of the
evidence as a whole. It is our opinion that the evidence
of the plaintiff was amply sufficient to sustain the verdict
of the jury in her favor, and while the evidence of defendant

contradicts that of plaintiff in many substantial particulars, still we would not be justified in disturbing the conclusions to which the jury arrived as to the force and weight of the evidence before them, and we are not prepared on the evidence to say that the verdict is contrary to its preponderating force after also weighing carefully the evidence of defendant found in the record.

Dr. Barnes was plaintiff's attending physician, and treated her constantly from the time of her injuries, suffered from defendant's assault upon her, to the time of the trial. Therefore statements made to the physician at the time he treated her for her injuries were properly admissible in evidence, and particularly is this so where the doctor testified that he did not make the examination he did make just prior to the trial for the purpose of qualifying himself as a witness to testify in the case. Were he testifying as an expert witness, the rule contended for by defendant would prevail, and such testimony as to the statements of the patient would not be admissible on the trial. The court held in I. C. R. R. Co. v. Sutton, 42 Ill. 438, that a physician when asked to give his opinion as to the cause of a patient's condition at a particular time must, necessarily, informing his opinion be, to some extent, guided by what the sick person may have told him, in regard to pains and sufferings. West Chicago St. R.R. Co. v. Kennelly, 170 ibid. 508; Greinke v. Chicago City Ry. Co., 234 ibid. 564, in which latter case the court said:

— 222 —

...and still we would not be justified in disturbing the
conclusions to which the jury arrived as to the force and
weight of the evidence before them, and we are not prepared
in the witness to say that the verdict is contrary to its
weight of the evidence before them, and we are not prepared
to say that the verdict is contrary to its weight of the
evidence before them, and we are not prepared to say that the
verdict is contrary to its weight of the evidence before them.

[illegible]

"Statements, however, made by an injured party which form part of the res gestae, or those made to his physician during treatment, constitute an exception to the general rules, and are admitted by reason of the fact that he will not be presumed to prevaricate at the very instant of his injury or while he is stating his physical condition to a physician from whom he expects and hopes to receive medical aid, nor will he be presumed to feign disease, pain or distress under those conditions in which he is ordinarily observed by strangers or his friends and neighbors."

We find no error in the testimony given by Dr. Barnes in relation to the condition of his patient, plaintiff, at the time when he treated her for her injuries suffered as a result of the assault upon her by defendant. We find no error in the rulings of the court upon the evidence, neither of Dr. Barnes, nor any of the other witnesses.

In an issue raised under a replication de injuria, to a plea of son assault demesne, the burden is cast upon the defendant to prove that the assault was made in necessary defense of his person from an attack by the plaintiff. As said in Reimenschneider v. Neusis, 175 Ill. App. 172:

"On an issue taken upon a replication de injuria to a plea of son assault demesne the burden is upon the defendant to prove the assault was made in necessary self-defense and that in making the assault he used no more force than was necessary."

To the same effect is Anderson Art Co. v. Greenberg, 118 Ibid. 217.

Defendant contends that an instruction given at the instance of plaintiff telling the jury that the rule is that defendant may "use only such force as was necessary"

at the time when he treated her for her injuries suffered as a result of the assault upon her by defendant. We find no error in the findings of the court upon the evidence, neither at Mr. Barker, nor any of the other witnesses.

[illegible]

The first of these is the fact that the
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TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

the instance of plaintiff telling the jury that the rule is that defendant may use only such force as was necessary to get defendant out of an investigation given at

was erroneous, because defendant contends that the true rule is that defendant may use such force as appeared to be necessary. Not conceding that the form in which this instruction was given was erroneous, still if it were, we think such error favored defendant. The difference between "was necessary" and "as appeared to be necessary" we think favored defendant. Furthermore, as the court said in Leckliedner v. Chicago City Railway Co., 172 Ill. App. 557,

"The plaintiff gave two instructions containing the same error, if it be an error, and therefore cannot complain."

Defendant's instruction contained substantially the same vice if such it be, where it is said, "yet if you believe from a preponderance of the evidence that the defendant used only such force as was reasonably necessary to protect herself, or such force as a reasonable and prudent person under the same or similar circumstances would exercise under the same or similar circumstances, then you should find the defendant not guilty." As this instruction contains substantially the same vice as that about which defendant complains, she therefore is estopped to complain that plaintiff's instruction in this regard was erroneous, as no where in defendant's instruction does she use the expression "use such force as appeared to be necessary," so that defendant's as well as plaintiff's instructions in this regard were in accord, even if erroneously so.

Counsel for defendant complain of the number of instructions given and the reiteration of certain principles of law more favorable to plaintiff than to defendant, and

was extremely, because the fact that the two trials
in that defendant was not held to be expected to be necessary.
Not necessary that the fact in which this instruction
was given was erroneous, still it is very, we think such error
favored defendant. The difference between "was necessary"
and "as appeared to be necessary" we think favored defendant.
Furthermore, on the facts said in People v. Chicago Dist.
172 Ill. App. 2d 444.

"The instruction gave the instruction containing
the same error, it is an error, and therefore
there cannot be a reversal."

Defendant's instruction contained substantially
the same error it was in fact, "yet it
you believe from a preponderance of the evidence that the
defendant used only such force as was reasonably necessary
to protect himself, or such force as a reasonable and
sensible person under the same or similar circumstances would
exercise under the same or similar circumstances, then you
should find the defendant not guilty." In this instruction
contains substantially the same error as that about which
defendant complains, and therefore is supposed to be prejudicial.
That plaintiff's instruction in this regard was erroneous,
as no error in defendant's instruction does in and the
expression "was such force as appeared to be necessary,"
so that defendant's as well as plaintiff's instructions in
this regard were in error, even if erroneously so.

Reason for defendant's complaint of the number of
instructions given and the repetition of certain principles
of law were immaterial to plaintiff's claim to defendant, and

that the giving of these instructions constituted reversible error. It is true that defendant requested but one instruction, which the court gave, and that the court at the instance of plaintiff gave thirteen instructions. While such number is unequal, that of itself, if the instructions were without error, would not warrant a reversal. As said in Krovitz v. Chicago City Ry. Co., 310 ibid. 387:

"Even though a number of instructions involve the reiteration of certain principles of law which are more favorable to one party than the other, the repetition is not ground for reversal, if the instructions are appropriate to the law and evidence of the case."

Nor is it reversible error because there was repetition of the legal principles in some of the instructions given at the instance of plaintiff.

If counsel for defendant wished other instructions than the one he tendered given on his behalf, it was his duty as counsel to prepare such instructions, for not so doing he cannot be heard to complain.

The record fails to disclose any reversible rulings of the trial court in the admission or refusal of evidence, or in the giving of instructions to the jury, or in denying defendant's motion for a new trial, or in entering judgment upon the verdict. Therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

that the giving of these instructions constituted reversible error. It is true that defendant requested but one instruction which the court gave, and that the court at the instance of plaintiff gave thirteen instructions. While each number is unusual, that of itself, if the instructions were without error, would not warrant a reversal. As said in Howie v. State, 111 Ky. 114, 115, 116, 117.

"Even though a number of instructions involve the violation of certain portions of law which are favorable to one party, the error, the repetition is not ground for reversal, if the instructions are appropriate to the law and evidence of the case."

Not in a reversible error because there was repetition of the legal principle in some of the instructions given at the instance of plaintiff. If counsel for defendant wished other instructions than the one he requested given on his behalf, it was his duty to counsel to prepare such instructions, for not as being he could be heard to complain.

The court fails to discuss any reversible rulings of the trial court in the admission or refusal of evidence, or in the giving of instructions to the jury, or in denying defendant's motion for a new trial, or in entering judgment upon the verdict. Therefore the judgment of the Superior Court is affirmed.

ATTORNEYS.

TAYLOR, P.L. AND WILSON, J. COUNSEL.

OSCAR RUBIN,
Appellant,
vs.
JACOB GREENMAN,
Appellee.

Appeal from
Municipal Court
of Chicago.

Opinion filed Feb. 23, 1928.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE
COURT.

This is an action between the plaintiff landlord and the defendant tenant, arising under a lease dated March 8, 1924, and running for a term of five years and one month commencing April 1, 1924, and ending April 30, 1929. The premises demised were stores numbered 3847 and 3849 West Roosevelt Road, Chicago, and were to be occupied for an automobile show and salesroom and accessories. The lease contained a warrant of attorney and power to confess judgment for rent at the several times when such rent might remain unpaid. On June 12, 1925, under the power of attorney contained in the lease, a judgment was confessed for rent for the month of June, 1925, \$350 with \$50 added for attorney's fees, and judgment thereon for \$400 entered of record. On motion of defendant with supporting affidavits, on August 27, 1925, the judgment by confession was opened and defendant let in to plead. There was a trial by court and jury, with a verdict for defendant, and a judgment thereon June 17, 1927. In the last named judgment order the judgment of June 12, 1925, by confession was set aside. From the judgment of June 17, 1927, plaintiff prosecutes this appeal.

Plaintiff assigns for error the giving to the court at

Approved: _____
Special Agent in Charge
Federal Bureau of Investigation
U. S. Department of Justice

TO: _____
FROM: _____
SUBJECT: _____

Opinion filed Feb. 23, 1938.

RE: JUSTICE HOBSON REPLYING THE OPINION OF THE

There is an action between the plaintiff and the defendant, arising under a lease dated March 6, 1934, and running for a term of five years and one month commencing April 1, 1934, and ending April 30, 1939. The premises leased were located at 5347 and 5349 West University Road, Chicago, and were to be occupied for an indefinite term and collection and possession. The lease contained a covenant of attorney and power to contract for the term of the several years when such right remain until, on June 12, 1935, under the power of attorney contained in the lease, a judgment was entered for rent for the month of June, 1935, \$400 with \$50 added for attorney's fees, and judgment thereon for \$450 entered at record. On motion of defendant with supporting affidavits, on August 27, 1935, the judgment by confession was opened and defendant set to go forward. There was a trial by jury and judgment was entered for defendant, and a judgment thereon June 17, 1936, and that same judgment entered the judgment of June 17, 1936, by confession was set aside. From the judgment of June 17, 1937, plaintiff presented this appeal.

Plaintiff assigns for error the giving to the court of

the request of defendant the last instruction, which is as follows:

"The court instructs the jury as a matter of law that if you believe from the evidence in this case that the premises in question were not ready for occupancy until after April first, 1924, and if you further believe from the evidence that the plaintiff promised and agreed to put the plumbing and the water pipes in such repair after the execution of the lease in question, and if you further believe from the evidence that said repairs were not made by the plaintiff, and if you further believe that thereafter water and other refuse fell from the ceiling or walls of said premises to and upon the automobiles displayed in the store room in question, and if you further believe that thereby and on account thereof said defendant suffered substantial damage and injury or was prevented from conducting his business in the usual and customary manner, then you are instructed that if said defendant vacated said premises and surrendered or offered to surrender the keys therefor to the plaintiff, then the law says that a constructive eviction of the tenant has occurred, and in such event you are instructed that such constructive eviction extinguishes all liability for rent from the date of such constructive eviction and in such case your verdict should be for the defendant;"

that the court erred in denying plaintiff's motion for a new trial and that the verdict and judgment are against the law and the evidence.

The lease was in writing and under seal. Therein, inter alia, the defendant covenanted that he had received the demised premises in good order, repair and condition, and would so maintain the same during the term at his own cost. There was a rider to the lease in which the plaintiff lessor agreed to make certain structural changes and repairs. That plaintiff did so is neither challenged by the affidavits, nor by the other proofs found in the record. Defendant bases his defense upon a constructive eviction by his landlord, the plaintiff. Defendant also relies upon conversations with his landlord varying in several particulars the terms of the written demise.

get me closer, just before the end of the sentence and the words "and then" are

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[illegible]

and the evidence.

his lawsuit varying in several particulars the terms of the complaint. Defendant also relied upon conversations with his defense upon a representative citation by his lawyers, the by the other proceeds found in the record. Defendant issues complaint did as is neither challenged by the defendant, nor agreed to with certain substantial changes and negative. That there was a right to the issue in which the plaintiff issues would so maintain the same during the term as his own state. Defendant promised in good order, regular and consistent, and also the defendant government that he had received the the issue was in writing and under seal. Therefore, in 1914.

Journal of Management Studies, 1987, 20(6), 631-642

It is axiomatic that a lease under seal cannot be changed, varied or altered by any agreement resting in parol, whether made prior to the execution of the lease or subsequent thereto. Defendant urges that the premises were not ready for occupancy in the month of April, 1924, and that he went into possession on May 5, 1924. Taking such contention at its face value, it has no effect upon the relation of the parties. The rent for the month of April is not involved. There being no evidence to the contrary, we will assume it was paid. We are only concerned in this appeal with the rent claimed to be due for the month of June, 1925, and the attorney's fees, for which the original judgment by confession was entered.

It is claimed also that plaintiff promised to make repairs to the plumbing and stop water from leaking, - this in April, 1924. Such promise, if made, under the authority of Harlow v. Khalik, 169 Ill. App. 624, was a nudum pactum and of no binding force or effect. Defendant was bound by the terms of his lease to make any repairs which were necessary to be made during the term of his lease. Defendant likewise claimed that the premises were not in repair when he entered into possession. That claim is abortive for the reason that he covenanted under seal that the premises were in good repair and condition, and there is no evidence in the record that defendant was influenced to execute the lease by any fraudulent representations made by his landlord. All the repairs that the plaintiff agreed to make were contained in the rider to the lease, and nothing regarding repairs to plumbing is found therein.

The reason for the conduct of defendant, we think, is apparent from his own statement, made to his landlord, which was that he was going to move to his own place at 3152 Ogden Avenue, Chicago, and this before making any claim of constructive eviction from the premises.

It is understood that a house which would be charged
would be affected by any agreement existing in regard, whether
made prior to the execution of the lease or subsequent thereto.
Defendant argues that the premises were not ready for occupancy
in the month of April, 1934, and that he was not in possession
on May 1, 1934. Taking such consideration as the law allows,
it is not believed that the relation of the parties. The fact
that the month of April is not involved. There being no evi-
dence to the contrary, we will assume it was April. We are only
concerned in this case with the rent claimed to be due for the
month of April, 1934, and the defendant's claim that the
original contract of tenancy was terminated on April 1.
It is claimed that the plaintiff's promise to rent the
premises was made before the month of April. - This is denied.
This, too, is denied. It is said, under the authority of Harlow v.
Harlow, 111 App. 2d, 204, that a verbal promise and an oral binding
contract are enforceable. Defendant was bound by the terms of his lease
to make any repairs which were necessary to be made during the
term of his lease. Defendant likewise claimed that the premises
were not in repair when he entered into possession. That claim
is repudiated for the reason that he represented under oath that
the premises were in good repair and condition, and there is no
evidence in the record that defendant was influenced to execute
the lease by any fraudulent representations made by his landlord.
All the repairs that the plaintiff agreed to make were completed
on or before the 1st of April, and nothing regarding repairs to
be made in April.
The reason for the contract of defendant, we think, is
apparent from the evidence, and to his landlord, which
was that he was going to move to his new place at 2125 Ogden
Avenue, Chicago, and this before making any claim of constructive

At the time of making that statement there was a "To Rent" sign in the window of the store in which was a notice to apply to "Kaplan Brothers, Nash Automobile Sales Co., 3152 Ogden Avenue". Defendant also told plaintiff that he found it very hard to keep two stores up; that he was kept busy at the other place, and that most of the customers who wanted to buy machines wanted to see him personally, and they go to the Ogden Avenue store for that purpose. The evidential facts strongly bear out this theory. Defendant had a store on Ogden Avenue, where he transacted business, and to that store he moved from plaintiff's premises. He did it to suit his own convenience; and it also appears that he assured plaintiff that he would pay the rent, and that he would have no difficulty in getting a tenant at an advanced rental in order to make up for much money he had spent during his occupancy in the improvement of the premises. When plaintiff said to defendant, "What is the matter that you are moving", he replied, "Well, we just decided that we cannot take care of both places, and we are going to have one sales room on Ogden Avenue. You people need not worry as far as the rent is concerned. That will be paid whether I am here or not. I can rent that place."

Defendant also gave in evidence that the toilets above the store got out of order and that water therefrom and from a wash bowl leaked down through the floors above the store and damaged some automobiles in the store; and that a loft in the building over defendant's demised premises, was rented to a social society, and that great disturbing noises were made, to the annoyance of defendant and the interruption of his business in the evening.

While all this testimony was denied by plaintiff and his

At the time of writing this statement there was a "To Hire" sign in the window of the store in which was a notice to apply to "Eugene Brown, Real Estate Sales Co., 1118 Ogden Avenue". Defendant also told plaintiff that he found it very hard to keep two evenings; that he was kept busy at the store place, and that most of the customers who wanted to buy machines wanted to see him personally, and they go to the Ogden Avenue store for that purpose. The defendant told plaintiff that he told plaintiff that a story he told him, that he intended plaintiff, and to tell him he would tell plaintiff's goodness. He did it to tell him the defendant, and it also appears that he accused plaintiff that he would pay the money, and that he would have no difficulty in getting a loan of an amount equal in value to what he was going to pay him, and that his business in the defendant's store, and that he would tell him the defendant, "and if the money that you are making", he replied, "Well, we just decided that we cannot take care of both places, and we are going to have one store room on Ogden Avenue. You people need not worry as far as the rent is concerned. That will be paid whether I am here or not. I am not that kind of a man."

Defendant also gave in evidence that the college store the store got out of order and that water thereon and from a wash bowl leaked down through the floor above the store and damaged some furniture in the store, and that a fire in the building over defendant's business premises, was caused by a small candle, and that great damage was done to the furniture in the building, and the investigation of the fire in the building.

While all this testimony was being given by defendant and the

witnesses, it is sufficient to say that the plaintiff under his lease to defendant was not responsible for such occurrences. There is no evidence in this record that any of the matters complained about by defendant was caused by any act of the plaintiff, and furthermore defendant did not remove from the demised premises on account of any such matters during the time of the occurrence thereof, and not until afterwards. Whatever reason he may have had to claim a constructive eviction before removing, no such condition was in existence at the time he vacated the premises.

The court admitted much evidence resting in parol de hors the covenants in the lease, and to this may be attributed the verdict of the jury. Without such evidence, which should not have been admitted by the court, there could have been no legitimate evidence left which would justify the verdict of the jury. From a perusal of all the evidence in the record we do find, after eliminating therefrom the evidence erroneously admitted by the court resting in parol in an effort to vary the terms of the demise in the record under seal, that the verdict of the jury is contrary to its probative force. On the admissible evidence in the record the court should have instructed a verdict in favor of the plaintiff.

The instruction last referred to is defective in many particulars, but fatally so in its direction to the jury that if they find from the evidence that the plaintiff promised and agreed to put the plumbing and the water pipes in such repair after the execution of the lease in question, and if they further believed that said repairs were not made by plaintiff and that water and other refuse fell from the ceiling or walls of the premises to and upon the automobiles displayed in the store room

... it is sufficient to say that the plaintiff's claim is
... to defendant was not responsible for such events.
... there is no evidence in this record that any of the matters
... explained about by the record was caused by any act of the
... plaintiff, and furthermore defendant did not remove from the
... retained promises on account of any such matters during the time
... of the occurrence thereof, and not until afterwards. Whatever
... reason he may have had to claim a retaliatory action before
... however, no such condition was in existence at the time he
... created the promise.
... the court admitted such evidence in regard to the
... occurrence in the issue, and to this way to substantiate the ver-
... dict of the jury. Without such evidence, which should not have
... been admitted by the court, there could have been no judgment
... evidence left which would justify the verdict of the jury.
... from a perusal of all the evidence in the record we do find
... after eliminating therefrom the evidence erroneously admitted by
... the court ruling in favor in an effort to verify the terms of
... the terms in the record under seal, that the verdict of the
... jury is contrary to the preponderance of the evidence.
... evidence in the record the court should have instructed a verdict
... in favor of the plaintiff.
... The instruction was returned to the defendant in many
... particulars, but mainly so in its relation to the jury that it
... they find from the evidence that the plaintiff promised and
... agreed to pay the defendant and the water pipe in such regard
... after the execution of the issue in question, and it they further
... believed that said pipe was not made by plaintiff and that
... water and other returns fall from the ceiling or walls of the
... premises he and upon the responsibility assigned in the same way

of defendant, and that thereby he suffered substantial damage and injury, then if defendant vacated the premises and surrendered or offered to surrender the keys therefor to plaintiff, the law says that a constructive eviction of the tenant has occurred, and that such constructive eviction extinguishes all liability for rent from the date of such eviction, and in such case their verdict should be for the defendant. This instruction misdirected the jury and thereby they were misled to find the verdict they did, for all such propositions of law were erroneous.

As said in Blake v. Ranaus, 25 Ill. App. 486:

"There is no implied contract on the part of a landlord that the leased premises are tenantable or that they will continue so during the term, nor is he bound to repair unless he has expressly agreed to do so in the lease or contract of hiring, and a promise to repair, made after the lease is entered into, is a mere nudum pactum, and no liability exists for a failure on his part to make such repairs."

Barrett v. Boddie, 158 Ill. 479, is to like effect, in which case the court said:

"The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease during occupancy thereunder."

What the court there said is equally applicable to the instant case.

Defendant's counsel seek to bring the instant case within the ruling of Gibbons v. Hoefield, 299 Ill. 485. In this attempt they certainly fail, as this case is not comparable with the Gibbons case. In the Gibbons case the premises leased were the store and basement of a building to be erected, and that the seepage of water into the basement thereof after the tenant entered into possession, was such as to constitute a

constructive eviction, the water remaining in the basement making it unfit for occupancy. In the instant case the demised premises were in existence and defendant entered into and enjoyed the possession thereof without any act interfering with such occupancy emanating from the plaintiff landlord. In the Gibbons case the defects were latent because the building was not erected and its condition could not be anticipated by the tenant, while in the instant case whatever defects there may have been were known to defendant when he executed the lease and thereunder entered into the possession of the demised premises. The Gibbons case is clearly distinguishable from the case at bar.

The judgment order of June 17, 1927, in this appeal, contains the following:

"This cause coming on for further proceedings herein, it is considered by the court that final judgment be entered on the verdict herein, and that the judgment rendered herein against the defendant, Jacob Rubin, by confession on June 12, 1925, for Four Hundred and 00/100 Dollars (\$400.00) be vacated and set aside and for naught esteemed, and the plaintiff take nothing by this suit, and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that execution issue therefor."

The judgment last quoted is reversed and the cause is remanded to the Municipal Court with instructions to expunge that judgment from its record, and to reinstate and put in full force and effect the judgment against defendant by confession of June 12, 1925.

REVERSED AND REMANDED
WITH DIRECTIONS.

Taylor, P. J., and Wilson J., concur.

153 - 32094

LEIBOWITZ & PORTER, INC.,
a corporation,

Appellee,

v.

U. J. HERRMANN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion of
the court.

This is an action based upon a guaranty entered
into March 31, 1926, at Chicago, Illinois, and which was
as follows:

"Chicago, Ill., March 31st, 1926.

"For a valuable consideration, the receipt
of which is hereby acknowledged, I guarantee to
pay to Leibowitz & Porter, Inc., of New York City,
N.Y., on demand any balance on any bills for goods
bought of said Leibowitz & Porter, Inc., from March
1st, 1926, for the account of the Illinois Shirt
Company, or Mr. C. J. Cornwell, of 506 South Wells
street, Chicago, Ill., to the amount of Three
Thousand Dollars, (\$3,000), or any portion thereof,
and not paid for by the said Illinois Shirt Company
when due.

This is intended to be a continuing guaranty
for Three Thousand Dollars (\$3,000) or any portion
thereof, until June 15th, 1926, waiving notice and
demand.

Signature:

U. J. Herrmann (Signed),
Court Theatre
(Address.)

Sworn to and subscribed before me this 1st day
of April, 1928.

(Signed) George D. Jaskisch,
My commission expires Feb. 6, 1929."

(Notary Seal).

RECEIVED
COMMERCIAL COURT
OF CHICAGO

Opinion filed Feb. 23, 1938.

THE COURT WITHIN delivered the opinion of

This is an action based upon a guaranty entered
into April 21, 1936, at Chicago, Illinois, and which was

Chicago, Ill., March 23rd, 1938.
The defendant, the receiver
of the Illinois State Bank, Chicago, Ill., guaranteed to
pay to the plaintiff, the receiver of the Illinois State Bank,
the amount of the account of the Illinois State Bank,
for the account of the Illinois State Bank, Chicago, Ill.,
to the amount of three
thousand dollars (\$3,000), or any portion thereof,
and not paid by the said Illinois State Bank
within 60 days.
This is intended to be a continuing guaranty
for three thousand dollars (\$3,000) or any portion
thereof, until June 15th, 1938, unless notice and

Witness my hand and the seal of the court at Chicago, Illinois, this 23rd day of February, 1938.
U. A. Hoffmann (Judge)
Court Reporter
(Attorney)

Given to and subscribed before me this 1st day
of April, 1938.
(Signed) George H. Jackson
My commission expires Feb. 8, 1938.

The statement of claim charged the sale and delivery of merchandise to the Illinois Shirt Company to the amount of \$1,455.57, of which no portion had been paid.

To the statement of claim, the defendant Herrmann filed an affidavit of merits, which was stricken from the files and an amended affidavit of merits being filed, the court proceeded to strike out paragraphs 1, 2, 3, 4, and 6 of said amended affidavit, and entered judgment for part of plaintiff's claim, to the amount of \$1,330.57, and ordered that the case proceed to trial as to the balance. It is argued, in the brief that it did not appear that a demand had been made upon the guarantor, Herrmann, before the bringing of this suit. This is answered by the fact that the instrument sued upon contains the clause: "This is intended to be a continuing guaranty for Three Thousand Dollars (\$3,000) or any portion thereof, until June 15th, 1936, waiving notice and demand." This clause, we believe, is sufficient to relieve the plaintiff of any responsibility, requiring a demand prior to the institution of the suit.

The court had the power to split the cause of action and enter judgment for such part thereof as was admitted by the pleadings, or for such part as to which no sufficient defense appears to have been pleaded to said claim. Section 55 of the Practice Act provides, among other things, that:

The amount of claim charged the said and
delivery of merchandise to the Illinois Bell Company
to the amount of \$1,400.00, of which no portion had been

In the statement of claim, the defendant
filed an affidavit of merit, which was returned from the
file and an amended affidavit of merit being filed, the
court proceeded to return an order for judgment for
of said defendant, and entered judgment for
at plaintiff's claim, to the amount of \$1,400.00, and
ordered that the case proceed to trial as to the balance.
It is argued, in the brief that it did not appear that a
demand had been made upon the defendant, however, before
the bringing of this suit. This is answered by the fact
that the instrument used even contains the claim: "This
is intended to be a continuing guaranty for those thousands
dollars (\$1,400) on any portion thereof, until June 1st,
1912. Further action and demand." This claim, we believe,
is sufficient to relieve the plaintiff of any responsibility,
vesting a demand upon the institution of the suit.

The court had the power to split the cause of
action and enter judgment for such part thereof as was
admitted by the defendant, or for such part as to which
no sufficient defense appeared to have been pleaded to said
claim. Section 55 of the Practice Act provides, among other

things, that:
"The court may, at any time, enter judgment for such part of the claim as is admitted by the defendant, or for such part as to which no sufficient defense appears to have been pleaded to said claim."

"If the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand, and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor."

The defendant having prayed an appeal from the judgment entered upon the pleadings, raises only the question before us as to the sufficiency of the judgment entered. Rogers v. Ridgley, 205 Ill. App. 32. We have examined those paragraphs stricken by the trial court and find none of them contained a good or meritorious defense to the action. The plea of payment of \$225.00 still remains with that court for disposition.

We see no error in the rulings of the court nor in the judgment entered in conformity to the statute, and, therefore, the judgment of the Municipal Court, as to that part of the plaintiff's demand amounting to \$1,230.50, is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

[illegible]

There is no error in the ruling on the entry of the judgment entered in conformity to the statute and, therefore, the judgment of the United States is to stand and the plaintiff is deemed entitled to \$1,500.00. It

Journal of Interpersonal Violence

● 國語科 ●

GOSS & GUISE (a corporation),

Appellant

v.

JAMES N. LOTT, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This matter comes before us on an appeal from an order of the Superior Court, sustaining a demurrer to an amended bill, and dismissing said bill for want of equity.

The bill recites that Goss & Guise, a corporation, complainant, was on February 4, 1924, engaged in the business of contracting plasterers, in the city of Chicago; that James N. Lott, defendant, was the owner of a piece of real estate situated in the city of Evanston, Cook County, Illinois; that on or about February 4, 1924, the parties entered into a written contract, under which the said defendant agreed to pay the complainant the sum of \$17,253 for certain material and labor to be furnished and performed in and about a forty-two apartment building, to be erected on the premises of the defendant. A copy of this contract is attached to the bill and made a part thereof. Complainant further charges that it furnished the necessary labor and material and in all respects complied with the terms of the contract; that on or about November

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COOK COUNTY, ILLINOIS
JANUARY 1, 1934

COOK COUNTY
JANUARY 1, 1934

JAMES E. HOLT, et al.
Appellants

Opinion filed Feb. 28, 1934.

MR. JUSTICE VILSON delivered the opinion of the

court.

This matter comes before us on an appeal from an order of the Superior Court, sustaining a demurrer to an amended bill, and dismissing said bill for want of equity.

The bill recites that Cook County, a corporation, complainant, was on January 4, 1934, engaged in the

business of constructing planters, in the city of Chicago; that James E. Holt, defendant, was the owner of a place of real estate situated in the city of Evanston, Cook County, Illinois; that on or about February 4, 1934, the parties entered into a written contract, under which the said defendant agreed to pay the complainant the sum of \$17,325 for certain material and labor to be furnished and performed in and about a forty-two apartment building, to be erected on the premises of the defendant. A copy of this contract is attached to the bill and made a part thereof. Complainant further charges that it furnished the necessary labor and material and in all respects complied with the terms of the contract; that on or about November

9, 1924, complainant procured from Dwight G. Wallace, the architect and superintendent employed in the erection of said building, a certificate in writing, to the effect that the complainant had completed its contract, according to the terms thereof; that under the orders of the agent of said defendant, complainant performed other special and extra work, in addition to that contained in the contract; that the defendant, on or about October 28, 1924, accepted the work and took possession of the building, and has ever since continued in said possession; that on or about February 11, 1924, complainant caused to be filed in the office of the clerk of the Circuit Court of Cook County, a statement of claim for mechanic's lien, a copy of which is attached to the bill and made a part thereof and marked "Exhibit B"; that demand has been made upon said defendant to pay the sum of \$1,910.85, the balance due from defendant to complainant, but that he has failed to do so. Certain other parties were made parties defendant to the bill. To this bill a demurrer was filed by the defendant Lott. On April 5, 1926 there was filed an amendment to the bill of complaint. On January 17, 1927, leave was given to withdraw this amendment, and amend said bill within five days. On January 22, 1927, an amendment was filed to said bill, by adding thereto certain allegations to the effect that one Dwight G. Wallace was an architect for the defendant and had acted in that capacity, and was the agent of the defendant in that regard; that on November 29, 1924, the said Dwight G. Wallace, acting for the said Lott, issued to complainant a certificate in writing, certifying that complainant was entitled to payment of \$1,253; that on or about January 8, 1925, complainant tendered said certificate to the owner of said premises and demanded payment. The

On January 6, 1934, complainant procured from Wright G. Wallace, the
existent and representative engaged in the execution of
said building, a certificate in writing, to the effect that
the complainant had completed the contract, according to
the terms thereof; that under the order of the agent of
said defendant, complainant performed other special and
extra work, in addition to that contained in the contract;
that the defendant, on or about October 22, 1934, accepted
the work and took possession of the building, and has
ever since continued in said possession; that on or about
February 11, 1934, complainant moved to be filed in the
office of the clerk of the Circuit Court of Cook County, a
statement of claim for amounts, item, copy of which is
attached to the bill and made a part thereof and marked
"Exhibit B"; that same was then made upon said defendant
to pay the sum of \$1,210.00, the balance due from defendant
to complainant, but that he has failed to do so. Complainant
thereupon made written demand to the bill. To
this bill a demurrer was filed by the defendant last
On April 5, 1934, there was filed an amendment to the bill
at complainant. On January 14, 1937, leave was given
to amend this amendment, and amend said bill within two
days. On January 22, 1937, an amendment was filed to said
bill, by adding thereto certain allegations to the effect that
said Wright G. Wallace was an agent for the defendant
and had acted in that capacity, and was the agent of the
defendant in that regard; that on November 22, 1934, the
said Wright G. Wallace, acting for the said last, furnished
to complainant a certificate in writing, certifying that
complainant was entitled to payment of \$1,235; that on or
about January 6, 1934, complainant furnished said certificate

amendment of April 5, 1925, having been withdrawn is not to be considered. We find no copy of Mechanic's Lien claim in the record although bill of complaint charges it to be attached and made a part thereof.

The contractin writing between the parties, entered into February 4, 1924, contained the following provision is regard to liens:

"Waiver of Liens."

"Neither the contractor nor any subcontractor, materialsen, nor any other person, shall file or maintain a lien, commonly called a mechanic's lien, for materials delivered for use in, or work done in the performance of this contract, and the right to maintain such lien by any or all of the above named parties is hereby expressly waived, except in the event of the failure or refusal of the owner to pay the amount called for, by any certificate of the architect, within three days of the date of its tender to the owner for payment. Then, and in such case only, shall any of the above named parties have the right to file and maintain a mechanic's lien."

It is insited on behalf of the defendant that the original bill filed in said cause did not set up a cause of action; and that the amendment thereto was filed more than two years after, the time fixed by statute in which such action should be brought to enforce a mechanic's lien.

The Supreme Court of this State has laid down the rule that no one can claim a lien unless it clearly appears that the requirements of the law have been complied with. It is in derogation of the common law and furnishes an extraordinary remedy to a particular cases. Contractors and materialmen still have all the rights of any other person to recover under their contracts but in order to avail themselves of the provisions of the Mechanics' Lien Act, they must follow the provisions of the statute strictly. and no intendments are indulged in. in favor

document of April 2, 1935, having been withdrawn in 1935
to be considered. We find no copy of Webster's in this
in the record although bill of complaint charges it to
be obtained and made a part thereof.

The contract writing between the parties,
entered into February 4, 1935, contained the following
provision in regard to time:

"Release of time."

"Believe the contractor has any subcontractor,
workmen, or any other person, shall file or
maintain a lien, contract or claim, or work
order, for services rendered for use in, or work
done in the performance of this contract, and the
right to maintain such lien by any or all of the
above named parties is hereby expressly waived.
In witness whereof, the parties have signed and
affixed their hands and seals at the City of New York,
this 4th day of February, 1935."

It is noted on behalf of the defendant that the
original bill filed in said cause did not set up a cause
of action; and that the amendment thereto was filed more
than two years after, the time fixed by statute in which
such action should be brought to enforce a mechanic's
lien.

The Supreme Court of this State has laid down the
rule that no one can waive a lien unless it already appears
that the requirements of the law have been complied with.
It is in violation of the common law and therefore an
extraordinary remedy to a particular case. Furthermore
and mattermen still have all the rights of any other
person to recover under their contracts but in order to
avail themselves of the provisions of the mechanic's
lien act, they must follow the provisions of the statute

of the lien complainant. Gronin v. Tatge, 281 Ill. 326.

The contract attached to the original bill of complaint and made a part thereof, contains a provision to the effect that no contractor, subcontractor nor materialman shall file or maintain a lien, and that right is expressly waived, "except in the event of the failure or refusal of the owner to pay the amount called for by any certificate of the architect, within three days of the date of its tender to the owner for payment."

There was nothing in the original bill showing that such a certificate of the architect had been presented to the owner within the time specified, nor an allegation that the owner had refused payment upon the presentation of such certificate; and this appears to have been a necessary allegation in order to show a right to recover.

The Supreme Court of this State in the case of Michaelis v. Wolf, 136 Ill. 68; at page 71 says:

"Where, in a building contract, provision is made for the payment of the price, or a portion or portions of such price, upon the certificates or certificates of the architect in charge of the construction of the building, the obtaining or presentation of such certificate or certificates is a condition precedent to the right to require payment, and such condition must be strictly complied with, or else a good and sufficient excuse shown for not complying therewith. Such compliance with the condition precedent, or excuse for non-compliance, must be averred in the pleadings and established by the evidence; and the rule in question, requiring compliance or excuse for non-compliance with a condition precedent, applies as well to a proceeding in equity as a suit at law."

In the case of North Side Sash & Door Co. v. Hecht, 295 Ill. 515, our Supreme Court in its opinion at page 518, says:

"Mechanics' liens are not recognized by the common law nor allowed in equity independently of statute but they exist only by virtue of statutes creating them and providing a method for their enforcement, therefore such statutes must be strictly construed with reference to all requirements upon which the right to a lien depends. (Gronin v. Tatge,

... ..

To the Institute of Statistics, University of Chicago

of the contract, within three days of the date of its
order to the owner for payment."

There was nothing in the original bill showing that such a condition of the architect had been presented to the owner within the time specified, nor an allegation that the owner had refused payment upon the presentation of such certificate. The bill is amended to insert a statement that the owner refused payment upon the presentation of such certificate.

Be aware that an adult will be asked to sign for you.

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... of the evidence, and the law is in question, ...

[illegible]

1. The first step in the process of the investigation is to identify the problem or the area of interest. This is done by conducting a literature review and by consulting with experts in the field. The next step is to develop a research plan, which includes a statement of the problem, a list of objectives, and a description of the methods to be used. The third step is to collect data, which is done by conducting experiments or by analyzing existing data. The fourth step is to analyze the data, which is done by using statistical methods or by other techniques. The final step is to draw conclusions, which are based on the results of the analysis.

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281 Ill. 336; Turner v. Brenckle, 249 id. 394; May Brick Co. v. General Engineering Co. 180 id. 535.) This is true notwithstanding section 39 of the act, which provides: 'This act is and shall be liberally construed as a remedial act.'

"As we have seen, section 11 of the act makes the date of the last delivery of material an essential and necessary averment, and section 7 limits the right of recovery to those cases where the bill or petition is filed within four months after the date of the last delivery of materials. It appears from the face of the original bill that the last delivery of material was on February 27, 1915, which was more than four months prior to February 19, 1916, the date of the filing of the bill. It was essential to the jurisdiction of the court that the bill show on its face a cause of action. A cause of action includes every fact necessary for the complainant to prove to entitle him to succeed, - every fact that the defendant would have a right to traverse. (Walters v City of Ottawa, 240 Ill. 353.) A want of allegations in the bill to sustain the relief sought is as fatal as the lack of proof to show complainant entitled to such relief. (Fletcher's Eq. Pl. & Pr. sec. 87.)

Under the rule as announced in these two cases, it would appear that the presentation of the architects certificate was an essential allegation, to aver and prove in order to recover. The Mechanics' Lien Act should be strictly construed; and, as said in North Side Sash and Door Co. v. Hecht, supra, a cause of action should include "every fact necessary for the complainant to prove to entitle him to succeed."

The failure to include this allegation in the original bill, presented a bill which did not comply with the cases cited, and therefore stated no cause of action. The amendment to this bill, filed more than two years after and beyond the period of the statute of limitations, failed to cure it, by reason of the fact that ⁱⁿ the first instance no cause of action appears upon the face of the original bill filed in the cause.

It has been argued by counsel for complainant that the original bill contained an allegation to the effect that

a certificate was obtained from the architect on November 9, 1924. We cannot see, however, that this is of any avail. The express provision of the contract between the parties provided that the contractor should not file nor maintain a lien except in the event of the failure or refusal of the owner to pay the amount called for by any certificate of the architect, within three days of its tender to the owner for payment. The fact, as shown in the bill of complaint, that the mechanic's lien was filed of record on February 11, 1924, long before such certificate was obtained, expressly shows on the face of the bill that such lien was filed without complying with the terms of the contract, and contrary to the express intention, as set out in the waiver clause. This clause provided that no lien should be filed of record and no action should be maintained upon it until after the obtaining of the architect's certificate and due presentation. The filing of the lien was in itself a violation of the express terms of the contract

We have not considered the question as to whether or not a lien can be filed of record and be available in an action based thereon, where it is filed before the work is done or the material was furnished, as was evident in this case. In view of the fact that the contract provides for the time when it shall be filed, it becomes unnecessary to pass upon whether or not it was prematurely filed, in the light of the statute.

Our attention has been called to the case of Eisendrath Co. v. Gebhardt, 232 Ill. 113. It does not appear that in that case there was any such clause or condition in the contract as there seems to be in the contract in the case at bar. It also appears from a

a certificate was obtained from the architect on November 1, 1934. It cannot be seen, however, that this is of any avail. The express provision of the contract between the parties provided that the contractor should not file any certificate of the architect in the event of the failure to receive of the owner to pay the amount called for by any certificate of the architect, within three days of the receipt of the same for payment. The fact, as shown in the bill of complaint, that the architect's lien was filed of record on February 11, 1935, long before such certificate was obtained, expressly shows on the face of the bill that such lien was filed without complying with the terms of the contract, and contrary to the express intention, as set out in the waiver clause. This clause provided that no lien should be filed of record and no action should be maintained upon it until after the expiration of the architect's certificate and the presentation of the bill of the lien was in itself a violation of the express terms of the contract.

We have not considered the question as to whether or not a lien can be filed of record and be available in an action based thereon, where it is filed before the work is done or the material was furnished, as was evident in this case. In view of the fact that the contract provides for the time when it shall be filed, it becomes unnecessary to pass upon whether or not it is prematurely filed, in the light of the statute.

Our attention has been called to the need of Hammer v. Hammer, 233 Ill. 113. It does not appear that in that case there was any such clause or condition in the contract as there seems to be in the contract in the case at bar. It also appears from a

reading of that case that the terms of performance, as outlined in the contract, were sufficiently set out in the original bill of complaint. We are of the opinion that the original bill in this case did not state a cause of action. It was ^a necessary requisite that the bill should show compliance with the terms of the contract as a condition precedent to the bringing of the suit, and, in this regard, it failed.

For the reasons stated in this opinion, the decree of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

Holdom, J. Concur;

Taylor, P.J. Dissenting:

It is the contention of the defendant that the bill of complaint did not allege sufficient facts to show a valid right on the part of the complainant to enforce a claim for a mechanic's lien; that the allegations of the bill itself negative such a right; that it is argued that because of certain words in the contract it was necessary for the complainant to have alleged affirmatively what he had done, if anything, in regard to the presentation of architects' certificates.

The contract between the complainant and Lott, (a copy of which was attached to the bill) as to work and material to be furnished, contained the following paragraph:

"Neither the contractor nor any subcontractor, materialman, nor any person, shall file or maintain a lien, commonly called the mechanic's lien, for materials delivered for use in, or work done in the performance of this contract, and the right to maintain such lien by any or all of the above named parties is hereby expressly waived, except in the event of the failure or refusal of the owner to pay the amount called for, by any certificate of the architect, within three days of the date

reading of that case that the terms of performance as outlined in the contract, were suitably set out in the original bill of complaint. We are of the opinion that the original bill in this case did not state a course of action. It was necessarily regulated that the bill should show compliance with the terms of the contract as a condition precedent to the bringing of the suit, and in this regard, it failed.

For the reasons stated in this opinion, the decision of the Superior Court is affirmed.

ADJUDGMENT AFFIRMED.

Wolcott, J. Concurring;
Taylor, P. J. Dissenting.

It is the contention of the defendant that the bill of complaint did not allege sufficient facts to show a valid right on the part of the complainant to enforce a claim for a mechanic's lien; that the allegations of the bill itself negative such a right; that it is argued that because of certain words in the contract it was necessary for the complainant to have alleged affirmatively what he had done, if anything, in regard to the presentation of architect's certificates. The contract between the complainant and defendant (a copy of which was attached to the bill) as to work and material to be furnished, contained the following provisions:

"Whether the contractor or any subcontractor, materialman, or any person, shall file or maintain a lien, commonly called the mechanic's lien, for materials delivered for use in, or work done in the performance of this contract, and the right to maintain such lien by any or all of the above named parties is hereby expressly waived, except in the event of the failure or refusal of the owner to pay the amount called for, by any certificate of the architect, within three days of the date

of its tender to the owner for payment, Then and in such case only, shall any of the above named parties have the right to file and maintain a mechanic's lien.²

It is not denied that the original bill of complaint sufficiently set forth all the necessary elements to make out a cause of action under the mechanic's lien statute, except that having made the written contract a part of the bill, and that contract containing the above mentioned paragraph, concerning the subject of "waiver of liens," it is contended for the defendant, Lott, that it was necessary for the complainant to have gone further and to have alleged, affirmatively, that the owner had failed or refused to pay the amount called for by a certificate of the architect within three days of the date of its tender to the owner, for payment.

It may be asked, however, why the complainant in his pleading, although he had alleged that he had filed his notice for a lien, and that he was entitled to one - should go further and allege that he had not failed to present an architect's certificate, and that within three days of its tender, the defendant, Lott, had failed or refused to pay it. The burden of showing any obstacle to his statutory right to, a lien was ^{not} upon the complainant but upon the defendant. With the original bill as it was, with the contract a part of it, he was entitled to a lien by reason of the statute; the reasonable inference being, from all that was alleged, that his statutory rights had not been waived; in other words, that the evidence, if the matter became a contest, would show there was no waiver that affected him. A waiver, generally, is made up of facts which must be shown by the one who asserts it, and not by one who relies upon its absence.

of its tender to the owner for payment. Then and in such case only, shall any of the above named parties have the right to file and maintain a mechanic's lien.

It is not denied that the original bill of complaint sufficiently set forth all the necessary elements to make out a cause of action under the mechanic's lien statute, except that having made the written contract a part of the bill, and that contract containing the above mentioned paragraph concerning the subject of "waiver of liens," it is contended for the defendant, that it was necessary for the complainant to have gone further and to have alleged, affirmatively, that the owner had failed or refused to pay the amount called for by a certificate of the architect within three days of the date of its tender to the owner, for payment.

It may be asked, however, why the complainant in his pleading, although he had alleged that he had filed his notice for a lien, and that he was entitled to one - should go further and allege that he had not failed to present an architect's certificate, and that within three days of its tender, the defendant, Lott, had failed or refused to pay it. The burden of showing any obstacle to his statutory right to a lien was upon the complainant and upon the defendant. With the original bill as it was, with the contract a part of it, he was entitled to a lien by reason of the statute; the reasonable inference being, from all that was alleged, that his statutory rights had not been waived; in other words, that the evidence, if the matter became a contest, would show there was no waiver that affected him. A waiver, generally, is made up of facts which must be shown by the one who asserts it, and not by one who relies upon its absence.

"Waiver" is the intentional relinquishment or abandonment of a known right - West v. Platt, 127 Mass. 372 or such conduct as warrants an inference of the relinquishment or abandonment. Enterprise Mfg. Co. v. Oppenheim, Oberndorf & Co. 114 Md. 368. And where facts are admitted or established, waiver becomes a question of law. Swedish-American Bank of Minneapolis v. Koebernick, 136 Wis. 473. Waiver must be evidenced by conduct of an unequivocal character. Barber v. Vinton, 82 Vt. 327. In Mettner v. Northwestern Nat. Life Ins. Co. 127 Iowa, 205 approving a definition in Bishop Cont. Sec. 792, the court said:

"Waiver, in a general way, may be said to occur whenever one in possession of a right conferred either by law or by contract, and knowing the attendant facts, does or forbears to do something inconsistent with the exercise of the right, or of his intention to rely upon it, in which case he is said to have waived it, and he is estopped from claiming anything by reason of it afterwards."

In reality, defendant's contention here is that the complainant is estopped from claiming a lien if it should be shown that he did not present the architect's certificates within three days; and taking that view of it, it is obvious that it was not necessary for the complainant in his bill to plead affirmatively the facts showing the contrary; that was for the defendant, if he saw fit, to plead and show.

The original bill was not demurrable. It alleged all the elements necessary to a cause of action under the statute. It alleged the filing of the lien notice, and that with the other facts set up, informed the defendant in sufficient detail. Of course, only ultimate facts, and not

"Waiver" is the intentional relinquishment or abandonment of a known right - West v. Gist, 187 Minn. 573. or such contact as warrants an inference of the relinquishment or abandonment. Enterprise Mfg. Co. v. Greenberg, 187 Minn. 573. And where facts are admitted or established, waiver becomes a question of law. Greenberg v. American Bank of Chicago, 187 Minn. 573. Waiver must be evidenced by conduct of an unequivocal character. Barber v. Union, 88 Vt. 387. In Waiver v. Northwestern Nat. Life Ins. Co., 187 Iowa, 305 approving definition in Dickson Cont. Sec. 792, the court said:

"Waiver, in a general way, may be said to occur whenever one in possession of a right consents either by law or by contract, and knowing the attendant facts, does or forbears to do something inconsistent with the exercise of the right, or of his intention to rely upon it, in which case he is said to have waived it, and he is estopped from claiming anything by reason of it afterwards."

In reality, defendant's contention here is that the complaint is estopped from claiming a lien it it should be shown that he did not present the architect's certificate within three days; and taking that view of it, it is obvious that it was not necessary for the complaint in his bill to plead affirmatively the facts showing the contrary; that was for the defendant, it he saw fit, to plead and show. The original bill was not demurrable. It alleged all the elements necessary to a cause of action under the statute. It alleged the filing of the lien notice, and that with the other facts set up, informed the defendant in sufficient detail. Of course, only ultimate facts, and not

all the details, need be pleaded. The complainant showed by his facts that he had complied with the statute, done the work, filed his lien and had not been paid. Further, the special clause in the contract did not, without something further, show either a waiver of his lien or an estoppel. It would take evidence of some kind in addition to the words of the contract, to prove that he had no lien. He was not bound, therefore, to anticipate a defense, or to set up in his pleading, in detail, what the evidence would be expected to show. If a decree had been entered, reciting the contents of the bill, and an appeal taken, and there were no certificate of evidence, it, the decree, would be good, as the law would presume that at the trial no evidence had been put in to show that the complainant had not presented his certificate within the time mentioned; the court would not hold that the bill on its face was bad, and that it did not state a cause of action.

The case of Michaelis v. Wolf, 136 Ill. 68, cited in the majority opinion, merely holds, where a bill was filed and it was answered and there was a trial and evidence introduced, that the evidence failed to show that the complainant had complied with one of the substantial terms of the contract, that is, he did not prove at the trial, as the contract required, that he had obtained, as to each payment claimed to be due, a certificate signed by the architect, and that as that was a condition precedent to his right to be paid, it could not be decreed that anything was due. It was also

All the details, need be pleaded. The complaint showed by its facts that he had complied with the statute, done the work, filed his lien and had not been paid. Further, the special clause in the contract did not, without something further, show either a waiver of his lien or an estoppel. It would take evidence of some kind in addition to the words of the contract, to prove that he had no lien. He was not bound, therefore, to anticipate a defense, or to set up in his pleading, in detail, what the evidence would be expected to show. If a defense had been entered, reciting the contents of the bill, and an appeal taken, and there were no certified facts of evidence, if the defense, would be good, as the law would presume that at the trial no evidence had been put in to show that the complaint had not presented his certificate within the time mentioned; the court would not hold that the bill on its face was bad, and that it did not state a cause of action.

The case of Richards v. Holt, 135 Ill. 22, cited in the majority opinion, merely holds, where a bill was filed and it was answered and there was a trial and evidence introduced, that the evidence failed to show that the complaint had complied with one of the essential terms of the contract, that is, he did not prove at the trial, on the contract recited, that he had obtained, as to each payment claimed to be due, a certificate signed by the mortgagee, and that at that time a condition precedent to his right to be paid, it could not be deemed that anything was due. It was also

held that, although the complainant charged that the certificates were withheld as the result of fraud, the charge of fraud was not made out by the evidence.

In the instant case, no question arises as to what is due the complainant, which was the only question in the Michaelis case. Here, no issue is made on that subject. The demurrer admits that Lott owes the complainant the sum of \$1,910.85. In the Michaelis case, no question arose as to a waiver of lien; the subject of lien is not only not discussed, but it is not even mentioned.

Further, as to the demurrers to the bill, as amended, the added facts set up in each amendment were only details of what was affirmatively, though more generally, stated in the way of ultimate facts, in the original bill. The court said in Eisendrath v. Gebhardt, 222 Ill. 113,

"It is next argued that if the original bill was filed in time the amended bill set forth a new cause of action on November 10, 1904, and the Statute of Limitations had then run. The cause of the action was the same. The property, the building, the work done, the price, the architect, the parties and the date and amount of the architect's certificates were the same. If relief had been granted under the original bill it would have been a bar to the cause of action for the same work on the same property stated in the amended bill. The amended bill did not state a new cause of action."

There is nothing in Rittenhouse & Embree Co. v. Warren, 264 Ill. 619, Barney v. Giles, 120 Ill. 154 or Michaelis v. Wolf, 136 Ill. 68, that suggests that the original bill, here, was bad, or, when amended, became a substantially different cause of action.

The provision of Section 7, of the lien act permits an amendment to a bill for mechanic's lien at any time before final decree as against the owner, provided the original bill be filed within two years

held that, although the complaint charged that the certificates were withheld as the result of fraud, the charge of fraud was not made out by the evidence. In the instant case, no question arises as to what is due the complainant, which was the only question in the Michaelis case. Here, no issue is made on that subject. The demurrer admits that Lot 10 owes the complainant the sum of \$1,910.83. In the Michaelis case, no question arose as to a waiver of lien; the subject of lien is not only not discussed, but it is not even mentioned.

Further, as to the demurrer to the bill, as amended, the added facts set up in each amendment were only details of what was affirmatively, though more generally, stated in the way of ultimate facts in the original bill. The court said in Wissendath v. Gephardt, 222 Ill. 133.

"It is here argued that if the original bill was filed in time the amended bill set forth a new cause of action on November 10, 1904, and the Statute of Limitations had then run. The cause of the action was the same. The property, the building, the work done, the price, the architect, the parties and the date and amount of the exchange's certificates were the same. If relief had been granted under the original bill it would have been a bar to the cause of action for the same work on the same property stated in the amended bill. The amended bill did not state a new cause of action."

There is nothing in Wissendath v. Gephardt, 222 Ill. 133, that suggests that on Michaelis v. Wolf, 132 Ill. 68, that suggests that the original bill, here, was bad, or, when amended, became a substantially different cause of action. The provision of Section 7, of the lien act provides an amendment to a bill for mechanic's lien at any time before final decree as against the owner, provided the original bill be filed within two years

after the completion of the work. Fifty-Ninth Street
Lumber Co. v. Emery, 237 Ill. App. 416.

In my judgment, the original bill was good,
and, so, a fortiori, it was amended.

March 22-1944. Saw out to Nainiagwan and back

THE UNIVERSITY OF CHICAGO PRESS

IN REPLY TO THE LETTER OF THE DIRECTOR OF THE FBI DATED MAY 19, 1964.

1914-1915
1916-1917

FREDERIC R. DOUGLAS,

Appellee,

v.

THOMAS M. KELLEY,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim charges that plaintiff was employed by the defendant at a salary of \$200 per month from January 1, 1921, to October 1, 1924; that there was due plaintiff \$9,000, as a result of services performed, of which defendant had paid \$3,000, leaving a balance of \$6,000 due and unpaid.

The affidavit of merits on behalf of the defendant stated that there was no salary due plaintiff from defendant; that the plaintiff did not perform any services at the request of the defendant; that he was not employed by the defendant at a salary of \$200 per month; but that the plaintiff was employed by the Cottage Grove Drug Company, a corporation, at a salary of \$100 per month; that the defendant was treasurer of said corporation and acted solely as an officer thereof and not in his own behalf; that the corporation paid the plaintiff his full salary for all the time he was employed. An amended affidavit of merits was filed by the defendant, stating that a dispute existed between the plaintiff and defendant as to what amount, if any,

345-1-1031

THE COURT
1938 - 1939

FRANKLIN D. ROBERTS
JUDGE OF THE CIRCUIT COURT
OF CHICAGO
MUNICIPAL COURT
OF CHICAGO
APPEAL FROM

Opinion filed Feb. 22, 1938.

MR. JUSTICE WILSON delivered the opinion of

the court.

The statement of claim charges that plaintiff

was employed by the defendant at a salary of \$200 per

month from January 1, 1931, to October 1, 1934; that there

was due plaintiff \$2,000, as a result of services performed

of which defendant had paid \$2,000, leaving a balance of

\$2,000 due and unpaid.

The affidavit of merits on behalf of the defendant

and stated that there was no salary due plaintiff from

defendant; that the plaintiff did not perform any services

at the request of the defendant; that he was not employed

by the defendant at a salary of \$200 per month; but that

the plaintiff was employed by the Cottage Grove Drug Company,

a corporation, at a salary of \$100 per month; that the

defendant was treasurer of said corporation and acted solely

as an officer thereof and not in his own behalf; that the

corporation paid the plaintiff his full salary for all the

time he was employed. An amended affidavit of merits was

filed by the defendant, stating that a dispute existed be-

tween the plaintiff and defendant as to what amount, if any,

was due the plaintiff from the defendant; and thereupon the defendant paid the plaintiff the sum of \$500, by check, in full accord and satisfaction of said claim.

The cause was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at the sum of \$2,500. Judgment was entered on that verdict. Two interrogatories were given to the jury and answered, as follows:

"Interrogatory 1. Did the plaintiff in the fall of 1934 and after the time for which he is claiming wages accept from the defendant a check for \$500 in full payment of all claims against the defendant?

A. No.

Interrogatory 2. Was said check given in payment of a disputed claim against the defendant?

A. Yes."

The facts in this case disclose that Frederick R. Douglas, plaintiff below, had first met the defendant, a physician, on or about January 1, 1931, at a clinic belonging to the defendant; that the defendant operated upon him for appendicitis; that after he recovered he had a talk with the defendant, who agreed to pay him \$200 a month to work for him; that the plaintiff went to work for the defendant and looked after his buildings, drove him around in his car, worked in the drug store, answered telephone calls and did other general work for him, for the sum hereinbefore referred to. He appears to have been a sort of handy man around the house and drug store, and the buildings of the defendant. He received checks from time to time and appears to have worked continuously for

[illegible]

The case in this case involves two females,
R. Douglas, plaintiff below, had first met the defendant,
A. [redacted], on or about January 1, 1967, at a clinic
belonging to the defendant; that the defendant operated
upon his son [redacted] that after he recovered he had
a talk with the defendant, who agreed to pay him \$200
a month to work for him; that the plaintiff went to work
for the defendant and lived with his mother, [redacted]
the woman in her own house is now living separately
from the father and his child [redacted] and the
the man [redacted] returned to. He appears to have been
a sort of handy man around the house and drug store, and
the building of the defendant. He received checks from
that in time and seems to have worked continuously for

the defendant from the year 1921 to December of 1924, and during that time received approximately \$3,000. On December 10, 1924, Kelley gave him an envelope which contained a check for \$500, which was introduced in evidence, bearing that date and made payable to the order of Fred Douglas. This check was drawn on the Cottage Grove State Bank and was signed, "Office account, Dr. Thomas H. Kelley, by Thomas H. Kelley." On the back of the check were the words "In full" and it appears to have been certified January 18, 1926, more than a year after delivery. The plaintiff testified that when he received the letter he told the bookkeeper of the defendant he wanted to see the doctor, but that the bookkeeper told him the doctor did not want to see him. He thereupon went to the bank with the check but was told there was not enough money there to certify it; that he left it and never collected on it from that time on and still had the check in his possession at the time of the trial. As already stated, the check was in the possession of the bank for a long period of time and appears to have been certified sometime in January, 1926. The plaintiff before the occasion in question apparently made requests for money from time to time and was told by the defendant that he, the defendant, was putting the money in the stock of the Cottage Grove State Bank, of which he was then a director, for the benefit of the plaintiff, - and he was not to worry about it that he would get it back with interest. He was paid from time to time, on account, with various kinds of checks, some times Dr. Kelley's personal checks and sometimes the checks of the drug store. From his account it appeared that there was due him in December, 1924, the sum of \$6,466.

the defendant from the year 1931 to December of 1934, and during that time received approximately \$5,000. On December 10, 1934, Kelly gave him an envelope which contained a check for \$500, which was introduced in evidence, bearing that date and made payable to the order of Fred Karpis. This check was drawn on the Cottage Grove State Bank and was signed, "Office account, Dr. Thomas Kelly, Dr. Thomas Kelly". On the back of the check were the words "Dr. Kelly". and it appears to have been certified January 18, 1935, more than a year after delivery. The plaintiff testified that when he received the letter he told the bookkeeper of the defendant he wanted to see the doctor, but that the bookkeeper told him the doctor did not want to see him. He then went to the bank with the check but was told there was not enough money there to certify it; that he left it and never collected on it from that time on and still had the check in his possession at the time of the trial. He already stated, the check was in the possession of the bank for a long period of time and appears to have been certified sometime in January, 1935. The plaintiff before the occasion in question he was not present for money from time to time and was told by the defendant that he, the defendant, was taking the money in the form of the bank account. Kelly Bank, of which he was then a director, for the benefit of the plaintiff, and he was not so very sure about it that he would get it back with interest. He was paid from time to time, on various kinds of checks, some times Dr. Kelly's personal checks and sometimes the checks of the drug store. From his account it appeared that there was two in January, 1934, the sum of \$5,000.

There is no question about the fact that there was a relationship of employer and employee existing between the parties, and the defendant admitted having paid him a total of \$4,700, exclusive of the \$500 check in question.

It is argued with considerable force on behalf of the defendant that the existence of the check, with the words "in full" on the back, comes within the rule announced in the case of Snow v. Greisheimer, 220 Ill. 106, to the effect that where a check is given and accepted, bearing the words "in full", it is a complete satisfaction of any indebtedness existing between the parties, where the amount is unliquidated. As a general rule this is correct, but the facts in this case show that the plaintiff attempted to interview the defendant concerning the amount of the check, but was denied admission; that the check when presented at the bank was refused because of insufficient funds; that it was left at the bank for over a period of a year; that it was never cashed by the plaintiff and was produced on the hearing of this case as evidence in support of his claim against Kelley. The relationship between the parties arose out of the operation by the defendant on the plaintiff, which created a situation between them which was somewhat different from the ordinary relationship arising out of the usual course of business. The general course of conduct between the parties would seem to indicate a reliance by the plaintiff upon the defendant, as shown by the fact that the plaintiff allowed and permitted his wages to remain in the hands of the defendant for long periods of time before collecting the same.

There is no question about the fact that there was a relationship of employer and employee existing between the parties, and the defendant admitted having paid him a total of \$6,700, exclusive of the \$200 check in question. It is argued with considerable force on behalf of the defendant that the existence of the check, with the words "in full" on the back, comes within the rule announced in the case of How v. Hirschman, 230 Ill. 108, to the effect that where a check is given and accepted, bearing the words "in full", it is a complete satisfaction of any indebtedness existing between the parties, where the amount is undisputed. As a general rule this is correct, but the facts in this case show that the plaintiff attempted to introduce the defendant concerning the amount of the check, but was denied admission; that the check when presented at the bank was returned because of insufficient funds; that it was left at the bank for over a period of a year; that it was never cashed by the plaintiff and was produced on the hearing of this case as evidence in support of his claim against relief. The relationship between the parties arose out of the operation by the defendant on the plaintiff, which created a situation between them which was somewhat different from the ordinary relationship arising out of the usual course of business. The general course of conduct between the parties would seem to indicate a reliance by the plaintiff upon the defendant, as shown by the fact that the plaintiff allowed and permitted his wages to run in the hands of the defendant for long periods of time before collecting the same.

The jury found in answer to Interrogatory 1, that the check for \$500 was not in full payment of all the plaintiff's claims against the defendant; and Interrogatory 2 is easily reconciled with Interrogatory 1, in that it may be said, as was said by the jury, that the check was given in payment of the disputed claim against the defendant. The interrogatory is not to the effect that it was given "in full payment" of a disputed claim against the defendant. The question as to whether or not there was an accord and satisfaction or a payment in full, was a question of fact for the jury. It would only become a question of law where the facts and circumstances were undisputed. The relationship between the parties; the refusal of the defendant to see the plaintiff; the fact that the check was not presented for payment and all the additional facts surrounding the circumstances, showing that the check was finally certified after a lapse of a year, by a bank of which the defendant was a director, clearly left the question as one of fact, as to whether or not its acceptance was an acceptance in full of the claim. Further, the words "in full" do not appear on the face of the check, but upon the back, and the check was signed "Office account, Dr. Thomas H. Kelley, by Thomas H. Kelley;" whereas the action was one against Thomas H. Kelley, individually and not in a representative capacity. The jury may have considered, among other things, that even though it may have been considered in full payment of the office account, it was not "in full" of the claim against the defendant, for all the services rendered to him by the plaintiff, growing out of the different lines of work, including work in the drug store, and on the defendant's buildings, and driving his car, which would not come under the head of "Office account."

The jury found in answer to interrogatory 1, that the check for \$500 was not in full payment of all the plaintiff's claims against the defendant; and interrogatory 2 is exactly reconciled with interrogatory 1, in that it may be said, as was said by the jury, that the check was given in payment of the disputed claim against the defendant. The interrogatory is not to the effect that it was given in full payment of a disputed claim against the defendant. The question as to whether or not there was an accord and satisfaction or a payment in full, was a question of fact for the jury. It would only become a question of law where the facts and circumstances were undisputed. The relationship between the parties; the refusal of the defendant to accede to the plaintiff's demand; the check was not presented for payment and all the additional facts surrounding the circumstances, showing that the check was finally settled after a lapse of a year, by a bank at which the defendant was a depositor, clearly left the question as to whether or not the acceptance was an acceptance in full of the claim. Further, the words "in full" do not appear on the face of the check, but upon the back, and the check was signed "Office account, Dr. Thomas H. Bailey, Jr. Thomas H. Bailey," whereas the action was one against Thomas H. Bailey, individually and not in a representative capacity. The jury was not concerned, among other things, that even though it may have been found that in full payment of the office account, it was not "in full" of the claim against the defendant. For all the evidence rendered to him by the plaintiff, pointing out the different items of note, including the work in the drug store, and on the defendant's full name, and having the name which would not come under the head of "Office account."

The reply briefs of appellant filed herein February 20th were fully considered by the court in connection with this opinion.

The trial court and the jury had an opportunity to see and observe the witnesses, and we see no reason to disturb their verdict.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. AND HOLDON, J. CONCUR.

The first month of the year 1911 was a very busy one for the company. The first week of the month was spent in the office, and the rest of the month was spent in the field.

The first week of the month was spent in the office, and the rest of the month was spent in the field. The first week of the month was spent in the office, and the rest of the month was spent in the field.

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THE FIRST WEEK OF THE MONTH

THE FIRST WEEK OF THE MONTH

215 - 32156

NATHAN WILLIAM MACCHESNEY,)	
)	
Appellee,)	APPEAL FROM
)	
v.)	SUPERIOR COURT,
)	
JOHN J. LIPSKI,)	COOK COUNTY.
)	
Appellant.)	

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion
of the court.

The facts in this case disclose that complainant, Nathan William Macchesney, was the owner of certain unimproved real estate at the Northeast corner of South Kedzie avenue and West Forty-sixth street in the City of Chicago, Cook County, Illinois; that the defendant John J. Lipski, was a real estate broker with offices at 4650 South Western avenue, which were near the property in question; that he was operating his business under the name of John J. Lipski & Company, Real Estate Brokers; that on January 8, 1925, he wrote the complainant to the effect that he had a client who was interested in the purchase of said property, and requesting the lowest price and terms. To this communication, on January 23, complainant replied that he would be glad to sell on reasonable terms and pay the regular broker's commission, and stating that his price for the property was \$14,000. On March 23, the defendant wrote complainant a letter in which he stated that he had a client who had made an offer of \$10,000 for

NATHAN WILSON vs. ...
Appellant

SUPERIOR COURT,
COOK COUNTY,
Illinois

...
Appellant

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion

of the court.

The facts in this case disclose that complain-

ant, Nathan Wilson, was the owner of certain

undivided real estate at the northeast corner of South

LaSalle Avenue and West Forty-third Street in the City

of Chicago, Cook County, Illinois; that the defendant

John A. Liska, was a real estate broker with office

at 4450 South Western Avenue, which were near the property

in question; that he was operating his business under

the name of John A. Liska & Company, Real Estate Brokers;

that on January 8, 1928, he wrote the complainant to the

effect that he had a client who was interested in the prop-

erty of said property, and requesting the lowest price

and terms. To this communication, on January 23, complain-

ant replied that he would be glad to sell on reasonable

terms and pay the real broker's commission, and stating

that his price for the property was \$14,000. On March 28,

the defendant wrote complainant a letter in which he stated

that he had a client who had made an offer of \$10,000 for

the property, with a certain amount to be paid in cash and the balance to be secured by mortgage. This offer was rejected by complainant and on March 25, the defendant called upon complainant and represented that \$13,000 was the best price the purchaser would pay; and that he as a broker, was familiar with values and that that was the best price that could be obtained. It appears that at that time the defendant had in his employ a certain Michael Zacker, and that on April 8, 1925, a contract of sale was entered into by which complainant conveyed to Michael Zacker title to said premises, by warranty deed, at a price of \$13,000, and received \$2,800 in cash, the balance of the purchase price being secured by principal and interest notes executed by Zacker. It appears further that the defendant retained, as commission, \$200 originally paid in the procuring of said contract, and on April 13, the complainant sent the defendant, at his request, a check for \$500, in payment of the balance of his commission as broker; that the complainant later discovered that Michael Zacker was, in fact, a dummy in the transaction; that it was unknown to the complainant that he was employed by the defendant at the time the contract was entered into; and that the contract between Zacker and complainant was for the benefit of the defendant. The defendant very shortly thereafter negotiated a sale of this property to one George Sharke and Alice Sharke, his wife, for the sum of \$25,000. By the terms of this agreement between Sharke and Zacker, Sharke paid \$8,000 in cash and executed a second mortgage or trust deed for \$7,000, and assumed the

the property, with a certain amount to be paid in cash and the balance to be secured by mortgage. This offer was rejected by complainant and on March 25, the defendant called upon complainant and represented that \$11,000 was the best price the purchaser would pay; and that he as a broker, was familiar with values and that that was the best price that could be obtained. It appears that at that time the defendant had in his employ a certain Michael Baker, and that on April 3, 1935, a contract of sale was entered into by which complainant conveyed to Michael Baker title to said premises, by warranty deed, at a price of \$11,000, and received \$2,000 in cash, the balance of the purchase price being secured by principal and interest notes executed by Baker. It appears further that the defendant retained, as tax collector, \$500 originally paid in the proceeds of said contract, and on April 15, the complainant sent the defendant, at his request, a check for \$500, in payment of the balance of his commission as broker; that the complainant later discovered that Michael Baker was, in 1935, a dummy in the transaction; that it was known to the complainant that he was employed by the defendant at the time the contract was entered into; and that the contract between Baker and complainant was for the benefit of the defendant. The defendant very shortly thereafter negotiated a sale of this property to one George Shanks and Alice Shanks, his wife, for the sum of \$25,000. By the terms of this agreement between the parties, a second mortgage of \$7,000, and assumed the

liability on the \$10,000 trust deed executed by Zacker.

It was charged in the bill of complaint, and denied by the defendant, that prior to the date of the contract between complainant and Zacker, the defendant had received an offer of \$14,000 for said property from a certain doctor named Yuska. The bill also charges, although denied by defendant, that conferences had been had between Sharko and the defendant prior to April 8, 1935, relative to the sale of said property to him Sharko at a price in advance of that which the defendant had named to the complainant as the highest amount obtainable.

The chancellor in his decree found that these facts were true and that at the time of the transaction in question, the defendant was acting for and on behalf of the complainant, as a broker, in procuring a sale of the property; that the facts in regard to negotiations with Zacker and Sharko were not disclosed to the principal; and that the said defendant, in fact, purchased said property through Zacker and subsequently transferred it to George Sharko and his wife, at the price hereinbefore named. The chancellor further found that in so doing the broker had failed in his duty to disclose the facts and that it was a fraud on the complainant; and directed that he account to the complainant for the difference between the price paid the complainant on the alleged sale to Michael Zacker of the property described in the bill of complaint, including the \$10,000 secured by the first mortgage, and the amount received by the defendant on the sale of the property to George Sharko and the commission of

liability - the \$10,000 must have been accounted by Baker.

It was charged in the bill of exchange, and denied by the defendant, that prior to the date of the contract between complainant and Baker, the defendant had received an offer of \$10,000 for said property from a certain doctor named Tuck. The bill also charges, although denied by defendant, that complainant had been had a loan from Baker and the defendant prior to April 5, 1901, relative to the sale of said property to him under a price insurance of that which the defendant had named to the complainant as the highest amount obtainable.

On May 17, 1901, the defendant in his answer found that these facts were true and that at the time of the transaction in question, the defendant was acting for and on behalf of the complainant, as a broker, in procuring a sale of the property, that the facts in regard to negotiations with Baker and Tuck were not disclosed to the principal, and that the said defendant, in fact, procured said property through Baker and subsequently transferred it to George Smith and his wife at the price hereinbefore named. The complainant further found that in so doing the broker had failed in his duty to disclose the facts and that it was a fraud on the complainant and directed that he account to the complainant for the difference between the price paid the complainant on the alleged sale to William Baker of the property described in the bill of exchange, including the \$10,000 received by the first attorney, and the amount received by the defendant on the sale of the property to George Smith and the commission of

\$700 paid to the defendant by the complainant on the alleged sale to Zacker, together with interest at the rate of 5 per cent. Said cause was referred to a master in chancery for an accounting between the parties.

The rule is clear that an agent owes a duty to his employer in transactions concerning the property of the principal and may not profit by such transaction, by withholding information in order to benefit thereby. The Supreme Court of this State in the case of Glover, et al v. Layton, et al, 145 Ill. 33, in its opinion on page 37, says:

"An agent while in the employ of his principal, cannot act for himself in respect to the same matter, nor will he be permitted to make a profit for his own benefit out of the business which his principal employs him to transact, and if he makes profits, he cannot hold them, but must account for them to his principal.

Furthermore, if in the purchase of the land in question, Farwell, knowing as the evidence shows he did, that Layton was Lawrence's agent, entered into an arrangement with him to buy the land ostensibly for himself, but really for the joint benefit of himself and Layton, the transaction was such a fraud upon Lawrence as would enable him, on being apprised of it, to rescind the sale and reclaim the land."

To the same effect see Johnson v. Bernard, 333 Ill. 537.

In the case at bar it is insisted by the defendant that he was not acting for the complainant, and after notice by the complainant, that he would hold him responsible for any profit he derived from the transaction, he attempted to return the commission. Where the facts in a case show that a commission has been paid by a vendor of real estate to a broker, a court is warranted in finding that the broker acted as the vendor's agent in the transaction, and the

\$700 paid to the defendant by the complainant on the
slight sale to Becker, together with interest at the rate
of 8 per cent. This amount was retained to a number in
connection with an accounting between the parties.

The rule is clear that an agent owes a duty to
his employer in transactions concerning the property of the
principal and may not profit by such transactions. By the
holding information in order to benefit thereby, the
Supreme Court of this State in the case of Glover, et al. v.
Harmon, et al., 105 Ill. 28, in its opinion on page 37, says:

"An agent while in the employ of his principal
cannot act for himself in respect to the same matter,
nor will he be permitted to make a profit for his
own benefit out of the business which his principal
employs him to transact, and if he makes profits,
the amount held there, but must account for them to
his principal.
Furthermore, it is the purchase of the land in
question, Harmon, knowing as the witnesses have
that Harmon was Harmon's agent, entered into
an arrangement with him to buy the land and thereby
for himself, and profit for the joint benefit of
himself and Harmon, the transaction was such a fraud
upon Harmon as would enable him, on being apprised
of it, to rescind the sale and reclaim the land."

For the same reason see Harmon v. Harmon, 105 Ill. 327.

If the case at bar is treated by the defendant
and that he was not acting for the complainant, and after
action by the complainant, that he would hold him responsible
for any profit he derived from the transaction, he attempted
to return the commission. Where the facts in a case show
that a commission has been paid by a vendor of real estate
to a broker, a court is warranted in finding that the broker
acted as the vendor's agent in the transaction, and the

attempt to return the money results in nothing more than to evidence the fact that the defendant was attempting to evade responsibility after the completion of the act.

In the case of Johnson v. Bernard, supra, the court in its opinion on page 528, says:

"It is contended by appellants that Zander was never employed by appellee as a real estate broker or ever stood in the relation of an agent to her, but, on the contrary, disclosed to her that he was himself purchasing the premises. There is a conflict in the evidence upon this proposition. The undisputed evidence is that Zander retained out of the proceeds of the sale \$180 as commission for the services of his firm in making the sale. Having demanded payment from appellee for his services as such broker and appellee having paid the same, the court was fully warranted by the evidence in finding that Zander acted as appellee's agent in the transaction."

The bill of complaint charging fraud, and asking for an accounting, as it did, and the facts disclosing that a fraud had been committed, and an accounting necessary, a court of equity had jurisdiction to proceed, for the purpose of settling the issue between the parties.

The chancellor had the opportunity to see and hear the witnesses, and his finding as to the facts should not be disturbed by this court unless it should clearly appear that the finding of the chancellor is clearly against the weight of the evidence. Amos v. The American Trust & Savings Bank, 221 Ill. 100, Schrader v. Schrader, 238 Ill. 469. From an examination of the testimony in this case, this court is of the opinion that the chancellor reached a correct conclusion from the facts in evidence, and we can see no reason for

attempts to return the money results in nothing more than to evidence the fact that the defendant was attempting to evade responsibility after the completion of the act.

In the case of Ray v. Bernard, supra, the

court in its opinion on page 222, says:

"It is contended by appellants that Raynor was never engaged by appellee as a real estate broker or ever acted in the relation of an agent for him, but, on the contrary, disclosed to her that he was himself purchasing the premises. There is a conflict in the evidence upon this proposition. The undisputed evidence is that Raynor retained out of the proceeds of the sale \$1500 as commission for the services of his firm in selling the sale. Having demanded payment from appellee for his services as such broker and appellee having paid the same, the court was fully warranted by the evidence in concluding that Raynor acted as appellee's agent in the transaction."

The bill of complaint charging fraud, and asking for an accounting, as it did, and the facts disclosed that Raynor had been retained by appellee as a real estate broker and that he had acted as such for the purpose of settling the loan between the parties.

The chancellor had the opportunity to see and hear the witnesses, and his finding as to the facts should not be disturbed by this court unless it should clearly appear that the finding of the chancellor is clearly against the weight of the evidence. Ray v. Bernard, supra, 222 Ky. 423. From Ray, 221 Ky. 423, Raynor v. Bernard, 222 Ky. 423. From an examination of the testimony in this case, this court is of the opinion that the chancellor reached a correct conclusion from the facts in evidence, and we can see no reason for

disturbing the judgment.

For the reasons stated in this opinion, the decree of the Superior Court is affirmed.

DECREE AFFIRMED .

TAYLOR, F.J. AND HOLDOM, J. CONCUR.

1890-1891

The following table shows the results of the survey of the population of the United States in 1890.

TABLE I.

POPULATION OF THE UNITED STATES IN 1890.

State	Population
Alabama	1,215,456
Arkansas	1,117,922
California	3,476,388
Colorado	359,035
Connecticut	581,289
Delaware	133,971
District of Columbia	32,831
Florida	555,111
Georgia	1,897,432
Idaho	23,341
Illinois	2,999,571
Indiana	2,299,271
Iowa	1,909,911
Kansas	1,021,911
Kentucky	1,928,571
Louisiana	1,121,541
Maine	581,289
Maryland	581,289
Massachusetts	1,215,456
Michigan	1,909,911
Minnesota	1,551,111
Mississippi	1,021,911
Missouri	1,909,911
Montana	23,341
Nebraska	359,035
Nevada	23,341
New Hampshire	23,341
New Jersey	1,215,456
New Mexico	23,341
New York	4,551,111
North Carolina	1,551,111
North Dakota	23,341
Ohio	2,999,571
Oklahoma	23,341
Oregon	23,341
Pennsylvania	4,551,111
Rhode Island	23,341
South Carolina	23,341
South Dakota	23,341
Tennessee	1,551,111
Texas	1,551,111
Vermont	23,341
Virginia	1,215,456
Washington	23,341
West Virginia	23,341
Wisconsin	1,551,111
Wyoming	23,341

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ALEX RUATTA,

Appellee,

v.

INSURANCE COMPANY OF
NORTH AMERICA,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 23, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The testimony in this cause shows that the plaintiff, Alex Ruatta, was in the business of buying and selling musical instruments commonly called accordions; that he had been in this business for over twenty-five years; fifteen of which had been in Chicago, with offices at 814 Blue Island Avenue; a music shop or display room at 840 Blue Island Avenue, and a store room on the top floor of 906 South Halsted street in the City of Chicago. This store room was about fifty feet wide by 100 feet long. On the morning of July 4th, 1925, a fire occurred in the building at 906 South Halsted street, and the stock of accordions was damaged and practically destroyed. An action was brought against the defendant Insurance Company of North America, to recover the amount claimed under a standard open policy of fire insurance issued by the defendant, insuring the stock of the plaintiff at 906 South Halsted street, to an amount not to exceed \$1,500. The cause was tried before a jury and a verdict in favor of the plaintiff was rendered, in the sum of \$1,627.44. Judgment was entered on the verdict and from that judgment

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ALICE HUNTER

ALICE HUNTER

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ALICE HUNTER

ALICE HUNTER

ALICE HUNTER

ALICE HUNTER

ALICE HUNTER

Opinion filed Feb. 22, 1928.

MR. JUSTICE WILSON delivered the opinion of the

court.

The testimony in this case shows that the plain-
 tiff, Alice Hunter, was in the business of buying and selling
 musical instruments commonly called accordions; that he had
 been in this business for over twenty-five years; fifteen of
 which had been in Chicago, with offices at 212 Pine Island
 Avenue; a music shop in Chicago room at 240 Pine Island
 Avenue, and a store room on the top floor of 208 South
 Halsted street in the City of Chicago. This store room
 was about fifty feet wide by 100 feet long. On the morning
 of July 2nd, 1925, a fire occurred in the building at 208
 South Halsted street, and the stock of musical instruments was destroyed
 and practically destroyed. An action was brought against
 the defendant Insurance Company of North America, to recover
 the amount claimed under a standard open policy of fire insur-
 ance issued by the defendant, insuring the stock of the plain-
 tiff at 208 South Halsted street, to an amount not to exceed
 \$1,500. The cause was tried before a jury and a verdict in
 favor of the plaintiff was rendered, in the sum of \$1,287.44.
 Judgment was entered on the verdict and from that judgment

this appeal is perfected.

There is no testimony in the record that the fire was of an incendiary origin, but, on the contrary, it was practically admitted that there was no evidence of any kind which would indicate such to be the fact. The defense, as set up in several notices of special defense, filed in the proceedings, was to the effect that the plaintiff was guilty of false swearing as to the number of accordions claimed by him to have been destroyed by fire, and of presenting to the defendant false and untrue books, purporting to show the record of the number and value of the accordions.

It is clear that under the special defenses, the burden was upon the defendant to prove the allegations therein contained. Lawrence v. Northwestern National Insurance Co., 197 Ill. App. 448.

It is argued that the court erred in admitting in evidence proof of loss furnished by the assured after the fire. We see no force in this argument, as the policy itself provided that proof of loss should be made; and it was properly admitted in evidence for the purpose of showing compliance with the terms of the policy. It had no other legal significance nor had it any weight as evidence of actual loss, but its introduction was for the sole purpose of showing that the plaintiff had taken the necessary preliminary steps to entitle him to sue on the policy in the event the loss was not paid. There does not appear to have been any other purpose in admitting it than to show one of the preliminary requirements called

4-2

this appeal is postponed.

There is no testimony in the record that the fire was of an incendiary origin, but, on the contrary, it was positively admitted that there was no evidence of any kind which would indicate even to be the fact.

The witness, as set up in several notices of special defense, filed in the proceedings, was to the effect that the plaintiff was guilty of false swearing as to the number of accessories claimed by him to have been destroyed by fire, and of presenting to the defendant false and untrue books, purporting to show the record of the number and value of the accessories.

It is argued that the court erred in admitting in evidence proof of loss furnished by the defendant after the fire. We see no force in this argument, as the policy itself provided that proof of loss should be made; and it was properly admitted in evidence. It had no other legal significance than the terms of the policy. It had no other legal significance than that it was a receipt for the loss of actual loss, but the introduction was for the sole purpose of showing that the plaintiff had taken the necessary preliminary steps to establish his claim on the policy in the event the loss was not paid. There does not appear to have been any other purpose in admitting it than to show one of the preliminary requirements of the policy.

for by the policy before instituting suit. It appears from the testimony that all books and papers of every kind and character were turned over to an expert accountant, furnished by the defendant, for the purpose of giving the defendant all the information in the possession of the plaintiff, concerning the number and value of the musical instruments involved. Certain minor discrepancies were discovered and testified to by the accountant, and considerable argument was made based on the fact that books of account were not kept in a manner which would provide the insurer with all the information which it desired. There is nothing in the policy of insurance requiring the keeping of books or that they shall be kept in any particular manner, or in any particular place.

It appears from the evidence that the plaintiff had been a repair man, working on the mechanism of accordions, who subsequently developed a business of his own, and was in the habit of keeping a stock book, showing the number of instruments received; their value and the number of sales made. Testimony of expert witnesses fixed the value of all the instruments on hand at prices running from \$112,000 to \$122,000. This testimony was based upon information furnished by the plaintiff from his books and records. It appears from plaintiff's testimony that he classified his various accordions according to type; that there was a number of these different classifications; and there were a number of accordions in each classification, on hand at 306 South Halsted street at the time of the fire. There appears to have been some discrepancy in his testimony as

for by the policy before instituting suit. It appears from the testimony that all books and papers of every kind and character were turned over to an expert accountant, furnished by the defendant, for the purpose of giving the defendant all the information in the possession of the plaintiff, concerning the number and value of the musical instruments involved. Certain minor discrepancies were discovered and testified to by the accountant, and considering this statement was made based on the fact that books of account were not kept in a manner which would provide the plaintiff with all the information which is desired. There is nothing in the policy of insurance requiring the keeping of books or that they shall be kept in any particular manner, or in any particular place.

It appears from the evidence that the plaintiff had been a repair man, working on the mechanism of recorders, who subsequently developed a business of his own, and was in the habit of keeping a stock book, showing the number of instruments received, their value and the number of sales made. Testimony of expert witnesses fixed the value at \$11,000. This testimony was based upon information furnished by the plaintiff from his books and records. It appears from plaintiff's testimony that he classified his various recorders according to type; that there was a number of those different classes; and there were a number of recorders in each classification, amounting to 200. Plaintiff stated at the time of the fire, there seems to have been some discrepancy in his testimony as

to the exact number of sales out of the instruments on hand, and he appears to have been cross-examined at great length in regard to these discrepancies.

The jury had an opportunity to see the witnesses and observe their conduct. The question of the amount of loss was purely one for the jury. We cannot say from the testimony as it appears in the record, that there was evidence showing fraud on the part of the plaintiff, by attempting to falsify books or records or in presenting false claims as to his loss. The jury and the trial court were evidently of the opinion that the defendant had failed in its offer to prove the truth of the pleas by a preponderance of the evidence, and we see no reason for disturbing their verdict.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR^R, P.J. AND HOLCOM, J., CONCUR.

10-11-1964

HARRIET FLYNN BOYLE,
Appellant,

vs.

JOHN M. SMYTH COMPANY et al.,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The decree which was appealed from in this case was between the same parties and entered at the same time as the decree considered in Appeal No. 31302, in which an opinion reversing and remanding the same has this day been entered. The facts and the law applicable are stated in that opinion at length and it is unnecessary to repeat here what is there stated.

In conformity with the views expressed in that opinion, that part of the decree here appealed from is also reversed and the cause remanded with directions to enter a decree in conformity with the views of this court as expressed in that opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and Matchett, JJ., concur.

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ANNUAL REPORT

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TRULY WARNER CO., Inc.,
a Corporation, Appellee,

vs.

KAUWEAN HATS, Inc.,
a Corporation, Appellant.

APPEAL FROM THE MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BATHURTT
DELIVERED THE OPINION OF THE COURT.

This cause is now before us after a rehearing granted upon the petition of the defendant. The appeal was asked by the defendant from a judgment entered on a verdict directed in favor of plaintiff at the close of all the evidence.

The action was in forcible entry and detainer. The premises involved are known as 189 West Madison street, Chicago. The suit was begun by filing a complaint signed "Truly Warner Company, Inc., H. Foy Shannon, Dist. Agr." The suit was filed on May 3, 1926. The defendant filed an appearance and demanded trial by jury. It did not file any affidavit of merits and was not obligated to do so under the Municipal court practice. Before judgment was entered on motion of plaintiff, leave was given plaintiff to amend the name of the plaintiff on all papers instanter to read "Truly Warner Co., Inc."

The errors assigned and argued are that the court granted plaintiff's motion for an instructed verdict and that the court refused to receive evidence offered by defendant, which defendant contends tended to prove that the plaintiff was a foreign corporation doing business in the state of Illinois without a license, contrary to the statute, and was therefore without right to maintain its suit (see chapter 32, section 94, Cahill's Ill. Rev. Stat. 1925.)

The briefs of the parties disclose conflicting state-

248 A. 1848

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APPEAL FROM THE CIRCUIT COURT OF CHICAGO

TRULY TRUST CO., INC.
a corporation
Appellee
vs.
KANTHAM BROS., INC.
a corporation
Appellant

MR. JUSTICE DELANEY
DELIVERED THE OPINION OF THE COURT

This cause is now before us after a rehearing granted upon the petition of the defendant. The record was taken by the defendant from a judgment entered on a verdict directed in favor of plaintiff at the close of all the evidence.

The action was in forcible entry and detainer. The premises involved are known as 100 West Madison Street, Chicago. The suit was begun by filing a complaint signed "Truly Trust Company, Inc., N. Y. Branch, West. N.Y." The suit was filed on July 1, 1928. The defendant filed a motion to dismiss the suit by July 1, 1928. It did not file any affidavits of denial and was not obliged to do so under the Municipal Court practice. Before judgment was entered on motion of plaintiff, leave was given plaintiff to amend the name of the plaintiff on all papers filed in the case.

The errors assigned and argued are that the court granted plaintiff's motion for an instructed verdict and that the court refused to receive evidence offered by defendant, which the defendant contended tended to prove that the plaintiff was a foreign corporation doing business in the state of Illinois without a license, contrary to the statute, and was therefore without right to maintain the suit (see chapters 22, sections 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

The price of the parties disclose conflicting views.

ments as to the facts which were made to appear upon the trial, but those which we regard as material are few and simple, and we think practically uncontradicted.

The plaintiff is a corporation organized under the laws of the state of New Jersey, as the lease in evidence indicates, in 1924. Its precise name is "Truly Warner Co., Inc." Its president is Truly Warner, who is also the president of another corporation known as "Truly Warner, Inc." The president of the defendant corporation is Benjamin H. Kaufman. At the time the suit was begun this corporation was in possession of the premises in question under a lease made by the trustees of the estate of Levi Z. Leiter to Benjamin H. Kaufman personally, which lease by its terms expired on April 30, 1926.

The premises in question are owned by the Leiter estate. While defendant argues there is no competent proof of this fact, the record shows slight but sufficient proof which was received without objection. This fact is also a necessary inference from the statements made by the defendant in the written correspondence with the trustees of the Leiter estate extending from July, 1925, to October 19, 1925. On that date the trustees withdrew an offer theretofore made by them to enter into a lease with the defendant demising these premises to defendant for another term. On October 20, 1925, defendant at New York mailed to the estate of "Z. L. Leiter" a letter stating in substance that it would accept the lease upon terms theretofore proposed by the trustees. The acceptance was unavailing as the offer to lease had been definitely withdrawn before the acceptance was mailed, and moreover, the terms of the proposed lease which had been submitted to the defendant expressly provided that it would not become a valid agreement until signed by the trustees. It was not signed by them. It was offered in evidence and excluded (properly) because there was no competent proof of its execution

... as to the facts which were made to appear upon the trial.
but those which we regard as material are few and simple, and we
think practically unnecessary.
The plaintiff is a corporation organized under the
laws of the state of New Jersey, as the facts in evidence indi-
cate, in 1924. Its precise name is "Lundy Bank, Inc."
The president is Lundy Warner, who is also the president of another
corporation known as "Lundy Bank, Inc." The president of the
defendant corporation is Benjamin H. Kantman. At the time the
suit was begun this corporation was in possession of the premises
in question under a lease made by the executor of the estate of
Lundy H. Warner to Benjamin H. Kantman personally, which lease by
its terms expired on April 30, 1925.
The business in question was owned by the latter.
estate. This fact is shown by the fact that there is no independent grant of this
fact, the latter being subject to the will of the testator which was re-
ceived after his death. This fact is shown by the fact that the
from the defendant's side of the balance sheet showing the
balance of the account of the estate which was received from
the estate of Lundy H. Warner in 1924. It is shown that the balance was
then in other transactions made by them so as to enter into a ledger with
the defendant during these months so defendant can another
fact. On October 20, 1924, defendant's balance sheet on the
estate of "L. H. Warner" a letter stating in substance that it
will accept the lease upon terms suggested proposed by the
defendant. The defendant was unwilling as the other to lease
the premises to the defendant's estate.
and accepted, the terms of the proposed lease which had been
submitted to it by the defendant. It was provided that it would not
be made a will of the estate until signed by the executor; it was
not signed by him. It was offered in evidence and excluded
(property) because there was no independent grant of the execution

or delivery.

Upon the expiration of the lease to Kaufman on April 30, 1926, defendant remained in possession of the premises and refused to surrender the possession although same was demanded by plaintiff.

The plaintiff claimed the right to possession under a written lease dated October 19, 1925. By the terms of this lease "the trustees under the last will and testament of Levi E. Leiter deceased," demised the premises for a term to begin May 1, 1926, and to end April 30, 1931. The lease is in evidence. It is under seal and is signed by Nancy Lathrop Carver Campbell by Joseph Leiter, attorney in fact, Joseph Leiter and William J. Warr, therein described as "trustees under the last will and testament of Levi E. Leiter, deceased," and it is also signed by the plaintiff corporation by its president. The lease is under the seal of the corporation. The genuineness of the signatures of the persons acting as trustees was proved without contradiction as was the delivery of the lease.

We do not regard some of the points made by the defendant as worthy of extended discussion. We have already stated the facts which justify the exclusion of the supposed lease under which defendant claimed.

Even less meritorious is the contention that there was evidence tending to show that defendant was not actually in possession of the premises. There is abundant evidence of that fact and none worthy of consideration to the contrary.

Likewise without merit is the further contention of the defendant that the lease introduced in evidence by the plaintiff fails to show that plaintiff had a right to the possession of the premises at the time of the beginning of the suit. The correspondence between the parties and the necessary inferences

On the expiration of the term of the lease on April 30, 1938, defendant remained in possession of the premises and refused to surrender the possession although same was demanded by

The plaintiff claimed the right to possession under written lease dated October 10, 1935. By the terms of this lease the premises under the last will and testament of David E. Lister, deceased, leased the premises for a term to begin May 1, 1936, and to run for 30 years. The lease is in evidence. It is under the signature of the plaintiff, David E. Lister, deceased, by Joseph Lister, attorney in fact, Joseph Lister and William J. West,

attorneys under the last will and testament of David E. Lister, deceased, and it is also signed by the plaintiff, Joseph Lister, deceased. The lease is under the seal of the plaintiff. The genuineness of the signature of the plaintiff is proved without contradiction as was the

fact that the lease was already signed by the plaintiff. The genuineness of the signature of the plaintiff is proved without contradiction as was the fact that the lease was already signed by the plaintiff.

There is no question as to the contention that there was evidence tending to show that defendant was not actually in possession of the premises. There is abundant evidence of this fact and some corroboration of the same. The contention of the plaintiff that the lease introduced in evidence by the plaintiff fails to show that plaintiff had a right to the possession of the premises at the time of the beginning of the suit. The contention of the plaintiff that the lease introduced in evidence by the plaintiff fails to show that plaintiff had a right to the possession of the premises at the time of the beginning of the suit. The

which must be drawn therefrom indicate at least prima facie the right of these trustees to give a valid lease of the premises.

It is elementary in a proceeding of this nature that the title to the premises is not necessarily involved, and if there are any defects in the execution of the lease under which plaintiff claims, the same are not such as the defendant, who, the record affirmatively shows, has no right either of possession or title, would have any standing to urge. In our opinion, defendant has no standing to urge (as it does) that one or more of the trustees of the Leiter estate should join in the execution of the lease to the plaintiff nor any standing to question the right of the trustees who made the lease under which plaintiff claims.

A question to which we have given consideration is raised by defendant's contention that plaintiff is a foreign corporation organized for pecuniary profit and doing business in Illinois without having obtained a license, and that it is therefore precluded from maintaining this suit in the courts of Illinois by virtue of section 94, chapter 32 of the Illinois Revised Statutes.

The defendant attempted to interpose this defense upon the trial although it had not previously been set up by notice, affidavit or plea of any kind.

We shall not recite the evidence offered and received at length, for upon further consideration we are inclined to the opinion that irrespective of the question argued as to whether the same was inadmissible by reason of any rule of the municipal court, we think it was wholly insufficient to establish the defense sought to be interposed or to raise any question for the jury on that issue.

In the first place, the evidence received and offered did not negative the possibility that the transaction out of which the suit arose was one in interstate commerce (Pamberger Stern Co.

which must be shown therefrom in order to establish the
right of these trustees to give a valid lease of the premises.
It is of course in a proceeding of this nature that
the title to the premises is not necessarily involved, and if
there are any defects in the execution of the lease under which
plaintiff claims, the same are not one of the defects, the
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has no standing to urge (as it does) that one or more of the
trustees who made the lease under which plaintiff claims
a question to which we have given consideration is
whether by defendant's contention that plaintiff is a foreign
corporation organized for pecuniary profit and doing business in
Illinois without having obtained a license, and that it is
therefore excluded from maintaining this suit in the courts of
Illinois by virtue of section 14, Chapter 110, Illinois
vised Statutes.
The defendant attempted to introduce this defense
and the trial court, it was contended, was not
just, arbitrary or bias of any kind.
We shall not decide the evidence offered and received
at length, for upon further consideration we are inclined to the
opinion that irrespective of the question argued as to whether
the same was established by reason of any rule of the
court, we think it was highly incumbent to sustain the de-
fense sought to be introduced or to raise any question for the
jury to find.
In the first place, the evidence received and all that
did not negative the possibility that the transaction out of which
the suit arose was one in interest common to Landmark State Co.

Anderson, 207 Ill. App. 222), nor did such evidence tend to prove that the transactions referred to were not merely preliminary to the transactions of the business in which the corporation was to engage. Automotive Co. v. Metal Products Corp., 327 Ill. 357. Nor did defendant distinguish between the different corporations of which Truly Warner was president.

It is apparent, however, that the court ruled upon the theory that defendant was not entitled to present the defense that plaintiff was an unlicensed foreign corporation by reason of non-compliance with the rules of the court. The reason for the ruling of the court is not important if that ruling was in fact correct. Certain rules of the Municipal court have been made a part of the record.

Rule 11 provides:

"In any action by or against a corporation, it shall not be necessary to prove the existence of such corporation, or that it sues or is sued by its corporate name unless, previous to the commencement of the trial the corporate existence of such plaintiff or defendant, or that its name is correctly stated, is denied by affidavit, signed by the party making such denial, or by his agent or attorney."

Rule 12 provides:

"Defendant shall, by motion to dismiss supported by affidavit, set up such matters in abatement as would be set up in the Circuit court by plea in abatement, supported by affidavit."

The defendant contends that rule 11 is applicable only to cases in which it is desired to deny corporate existence and points out that the defense here sought to be interposed did not deny such existence but on the contrary affirmed it. The plaintiff on the contrary says that the certificate offered tended to prove no more than the existence of the corporation and was therefore properly excluded. We are disposed, however, to hold that if the defendant had a right to present this defense, the certificate was admissible and rule 11 not applicable.

However this may be, if the defense which the defendant sought to interpose amounted to setting up matters in abatement, there remains yet for consideration the principal matter discussed in our former opinion, namely, as to whether this evidence was admissible in the absence of an affidavit raising the question. The defendant contends that an affidavit was unnecessary because section 48 of the Municipal Court act (sec. 403, chap. 37, Smith-Hurd Ill. Rev. Stat. 1925) provides:

"An affidavit for attachment *** and complaint in forcible detainer shall be the only written pleadings required, except such written pleadings or statements as may be required from time to time by the rules of the Municipal Court."

And further by reason of rule 17 of the Municipal court, which provides:

"An affidavit for attachment *** and complaint in forcible detainer shall be the only written pleadings required."

An affidavit, however, is not technically a written pleading, and in Museum of Fine Arts v. Dicus, 207 Ill. App. 389, it seems to have been assumed in a forcible entry and detainer case that an affidavit was necessary in order to present this defense, although the question was apparently not argued there. The controlling question on this point is whether a defense under section 94 of the Corporation act is such matter as in the Circuit court would be required to be set up by a plea in abatement. It seems to have been so held under a similar statute in Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391. We find the general rule stated in 1 Corpus Juris, 119, as follows:

"The objection that a plaintiff foreign corporation is incapable of maintaining an action because it has not appointed a resident agent, or otherwise complied with the statute imposing conditions precedent to the right of foreign corporations to sue, is usually held to be ground of abatement only."

In the same volume at page 110 it is stated:

"If there is a cause of action, but action is brought without performance of a condition precedent to the right to sue thereon, this objection is ground for abatement of the action and must usually be so pleaded. If, however, non-performance of the condition goes to show that there is no

There is no other person named in the document.

James was admitted to the chamber of an attorney and was

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

THE UNIVERSITY OF CHICAGO PRESS

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Journal of Management Education 33(10) 1111-1126

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11. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

7-10-68

cause of action at all, it is matter in bar and cannot be pleaded in abatement."

An examination of cases in jurisdictions having a system of pleading similar to our own discloses that a defense of this nature is usually presented in this way. (See Kat'l Fertilize v. Fall River, etc. Bank, 196 Mass. 458.) However, in Metropolit a Discount Co., v. Pitsch, 208 Ill. App. 407, cited as authority in Puterbaugh's Common Law Pleading and Practice, 10th ed., sec. 230, the court seems to have decided that the defense was properly raised by a plea in bar. The opinion in that case is abstracted, but from the facts disclosed it would seem that the suit was brought by the plaintiff upon a contract made in the State of Illinois when the corporation was doing business without a license in violation of the statute. The court therefore may have held on the theory that the contract was void that the defense pleaded was one in bar. Both on principle and authority, we think there is a clear distinction between such cases and those where the suit is not based on a contract made within the state, since in such cases suits might be maintained in courts of another jurisdiction. We are clearly of the opinion that both on principle and authority in the latter class of cases the defense is properly set up by a plea in the nature of a plea in abatement, since it goes only to the capacity of a plaintiff to maintain a suit and not to the merits of the action. Pitts Sons Mfg. Co. v. Commercial Kat'l Bank, 121 Ill. 582. We think too that this construction is in harmony with the decisions of the courts of other states in construing similar statutes. David Lupton's Sons v. Auto Club of America, 225 U. S. 489; Mahar v. Harrington Park Villa Sites, 204 N. Y. 231; Model Heating Co. v. Magarity, 81 Atl. 394, 11 R. A. 1915 B. vol. 54, 11 R. A. R. S.

cases of action at all, it is not in fact and cannot be
pleaded in defense.

An examination of cases in jurisdictions having a

system of pleading similar to our own discloses that a defense of

this nature is usually presented in this way. (See Restatement)

Section 1111, Restatement (Second) of Torts, § 1111. However, in Restatement

Section 1111, Restatement (Second) of Torts, § 1111. cited as authority

in Restatement's Common Law Torts and Restatement, Section 1111, Restatement

Section 1111, Restatement (Second) of Torts, § 1111. the court seems to have decided that the defense was properly

presented in this way. The court in this case is not

but from the facts disclosed it would seem that the only way

brought by the plaintiff when a contract made in the State of

Illinois when the corporation was doing business without a license

in violation of the statute. The court therefore may have held

on the theory that the contract was void that the defense pleaded

was not in fact. This is not surprising and certainly, as the court

is a clear distinction between cases where the contract is void

it has been held in occasional cases where the contract is void

cases which would be maintained in courts of general jurisdiction.

The law of Illinois in this respect is not uniform and certainly

is not uniform in cases where the contract is void and as to

even in the case of a plea in abatement, it has been held

that a plea in abatement is not a plea in law and is not

subject to the same rules as a plea in law. Restatement

Section 1111, Restatement (Second) of Torts, § 1111. We think too that this construction is in

harmony with the distinction in the court's opinion stated in

previous cases. Restatement's Common Law Torts and Restatement

Section 1111, Restatement (Second) of Torts, § 1111. Section 1111, Restatement

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Section 1111, Restatement (Second) of Torts, § 1111. Section 1111, Restatement

Section 1111, Restatement (Second) of Torts, § 1111.

Our conclusion is that the defense here sought to be interposed was of such a nature that it would have been necessary in the Circuit court to set up the same by a plea in abatement, and that in the absence of an affidavit evidence tending to sustain this defense was not admissible.

The plaintiff has called our attention to the case of O'Dara Const. Co. v. Emerson, 326 Ill. 13, in which sections 96, 101 and 105 of the Corporation act were declared unconstitutional, and argues therefrom that section 94 of that act is also unconstitutional. That question, however, was not raised in the trial court, and we do not think it can be raised here at this time. St. of Illinois v. Milwaukee, 318 Ill. 198.

This court has not at any time entertained any doubt as to the substantial justice of the judgment entered in the trial court, but we have not been in entire accord as to the theory upon which the decision of the case should be based. The cause was argued orally, and the court at that time suggested to counsel that there was a question in the mind of the court as to whether section 94 was applicable to a proceeding of this nature since it was not a suit either at common law or in equity. The attorney for defendant suggested that if the decision was to be put upon that ground, he would desire an opportunity to present authorities, and such opportunity has been afforded by the granting of a rehearing upon the petition of defendant.

Section 94 is as follows:

"No foreign corporation doing business in this State without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this State upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor

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The plaintiff has called our attention to the case of O'Gara Coal Co. v. Emerson, 326 Ill. 18, in which sections 96, 101 and 105 of the Corporation Act were declared unconstitutional, and argues therefrom that section 94 of that act is also unconstitutional. That question, however, was not raised in the trial court, and we do not think it can be raised here at this time. St. of Illinois v. Silaskas, 318 Ill. 198.

This court has not at any time entertained any doubt as to the substantial justice of the judgment entered in the trial court, but we have not been in entire accord as to the theory upon which the decision of the case should be based. The cause was argued orally, and the court at that time suggested to counsel that there was a question in the mind of the court as to whether section 94 was applicable to a proceeding of this nature since it was not a suit either at common law or in equity. The attorney for defendant suggested that if the decision was to be put upon that ground, he would desire an opportunity to present authorities, and such opportunity has been afforded by the granting of a rehearing upon the petition of defendant.

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the Commission is that the defense have sought to be
imposed was of such a nature that it would have been necessary
in the Circuit Court to set up the same by a plea in abatement,
and that in the absence of an affidavit or other pleading to sustain
this defense was not admissible.

The plaintiff has called our attention to the case of
People v. ..., 222 Ill. 10, in which sections 75,
101 and 102 of the Corporation Act were declared unconstitutional,
and argues that the same are void on the ground that they are
unconstitutional. That question, however, was not raised in the trial
court, and we do not think it can be raised here at this time.

THE DEFENSE'S MOTION FOR A NEW TRIAL

This court has not at any time considered the
as to the admissibility of the evidence introduced in the trial
court, but we have not been in active accord as to the theory upon
which the decision of the case should be based. The court was
satisfied that the same was a question in the mind of the jury as to whether
it was admissible to a proceeding of this nature since it
was not a suit at common law or in equity. The attorney for
the defendant suggested that if the decision was to be set aside
there, we would have an opportunity to present authorities, and
have expert testimony and other evidence in the case.

THE COURT'S DECISION

The court has considered the authorities in this case and
has concluded to sustain the verdict as law or in
equity is not at issue upon any question
of fact or of law; and all such questions
shall be decided by the court as a matter of law.

Our conclusion is that the defense herebrought to be interposed was of such a nature that it would have been necessary in the Circuit court to set up the same by a plea in abatement, and that in the absence of an affidavit evidence tending to sustain this defense was not admissible.

The plaintiff has called our attention to the case of O'Gara Coal Co. v. Emerson, 326 Ill. 18, in which sections 96, 101 and 105 of the Corporation act were declared unconstitutional, and argues therefrom that section 94 of that act is also unconstitutional. That question, however, was not raised in the trial court, and we do not think it can be raised here at this time. St. of Illinois v. Kiluskas, 318 Ill. 198.

This court has not at any time entertained any doubt as to the substantial justice of the judgment entered in the trial court, but we have not been in entire accord as to the theory upon which the decision of the case should be based. The cause was argued orally, and the court at that time suggested to counsel that there was a question in the mind of the court as to whether section 94 was applicable to a proceeding of this nature since it was not a suit either at common law or in equity. The attorney for defendant suggested that if the decision was to be put upon that ground, he would desire an opportunity to present authorities, and such opportunity has been afforded by the granting of a rehearing upon the petition of defendant. In view of these facts, we regard the statement in defendant's brief upon rehearing of a desire "to protest against the course of procedure that has taken place in this cause" as uncalled for and ungracious.

Section 94 is as follows:

"No foreign corporation doing business in this State without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this State upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor

of not less than \$250 nor more than \$1,000, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney General."

It is apparent this section of the statute is highly penal in its nature and should therefore be strictly construed. The controlling question in considering this (as in the construction of any statute) is, what was the intention of the legislature. If it had been the intention of the legislature to exclude unlicensed corporations from maintaining any action or suit in any of the courts of this state, the phrases, "at law or in equity," and "whether arising out of contract or tort," would have been wholly unnecessary; or if it had been the intention of the legislature to include in the suits which ^{not} might be maintained special statutory proceedings, it would seem that since these are neither suits at law as distinguished from suits in equity nor suits in equity as distinguished from suits at law, they too would have been enumerated and included. The phrase, "whether arising out of contract or tort," is simply descriptive of the "suit at law or in equity" which may be maintained and qualifies and limits the meaning of that phrase. That a suit in forcible entry and detainer is not an action ex contractu is decided in Shulman v. Moser, 234 Ill. 134.

In French v. Miller, 126 Ill. 611, the court held, adopting as its own the opinion of this court, that a confession of judgment upon a warrant of attorney in an action of forcible detainer was irregular and unauthorized, and that opinion quotes with approval from the opinion in the case of Burns v. Bash, 23 Ill. App. 552, where, in considering a similar question this court said:

"The practice of entering judgment by confession upon warrant of attorney, without process, in all actions of tort, did not obtain, and there is no precedent for it at common law, so far as we have been able to ascertain."

In neither case was a decision of the question of whether an action in forcible entry and detainer was one in tort necessary

of not less than \$500 nor more than \$1,000, to be recovered in any court of competent jurisdiction, in a civil action to be brought and prosecuted by the Attorney General.

It is apparent this section of the statute is highly penal in its nature and would therefore be strictly construed. The controlling question in considering this (as in the construction of any statute) is, what was the intention of the legislature. If it had been the intention of the legislature to exclude unlicensed corporations from maintaining any action or suit in any of the courts of this state, the phrase, "at law or in equity," and "whether arising out of contract or tort," would have been clearly unnecessary; as it is well known that litigation of the law is to include in the writs which might be maintained against statutory corporations, it would seem that since these are neither suits at law or in equity, but suits in equity, the words "at law or in equity" would have been unnecessary. The phrase, "whether arising out of contract or tort," is simply descriptive of the nature of law or in equity, which may be maintained and decided and limits the scope of that phrase. That a suit is for equitable relief and damages is not an action in equity as stated in Smith v. Smith, 101

101, 102.
In Smith v. Smith, 101, 102, the court said:
"It is well known that the phrase, 'at law or in equity,' is simply descriptive of the nature of law or in equity, which may be maintained and decided and limits the scope of that phrase. That a suit is for equitable relief and damages is not an action in equity as stated in Smith v. Smith, 101, 102."
The question of whether judgment by confession upon warrant of attorney, without process, in all cases of tort, is not a question of law, and there is no precedent for it in common law, so far as we have been able to ascertain.
In neither case was a decision of the question of whether an action in tortable writ or detainer was one in tort necessary.

to a decision of the case, while in both opinions it was clearly pointed out that an action in forcible entry and detainer was a proceeding purely statutory and in derogation of the common law. In the Supreme court three of the dissenting Judges pointed out that an action in forcible entry and detainer was not an action in tort. It is true, in St. Louis Stock Yards v. Wiggins Ferry Co., 102 Ill. 514, the court in the course of its opinion stated in substance that, while the action was "not a common law action, it is nevertheless an action at law, relating to real property," and that estoppel was therefore applicable as a defense. It is also true, as defendant points out, that in section 11 of the Forcible Detainer act (See Smith-Hurd's Ill. Rev. Stat. 1927, p. 452) provides:

"Trials under this act in courts of record shall be the same as in other cases at law in such courts."

However, we do not think it may be necessarily inferred therefrom that a case in forcible entry and detainer is a suit at law as distinguished from one in equity. Section 11 prescribes the course of procedure and the manner of pleading which shall be applicable in proceedings of this nature. It would have been unnecessary to make such provision had the proceeding been one in tort to which the rules of the common law were applicable.

In Wentworth v. Sangstone, 233 Ill. app. 48, the third division of this court held that a proceeding in forcible entry and detainer being a special statutory one in derogation of the common law, the writ of error was not a writ of right therein; that the appeal authorized by the statute to review such a proceeding was exclusive. That case has been approved by the Supreme court of Illinois in the recent case of City of Chicago v. Steamship Lines, 328 Ill. 309, which case was sent by this court to the Supreme court upon a certificate of importance. The opinion there discusses the action of forcible entry and detainer from the most ancient

times, and the conclusion reached is as follows:

"The civil remedy in this State for the restitution of premises, based on forcible entry and detainer, was unknown to the common law and is purely statutory in its origin. While our statute on forcible entry and detainer contains some of the ideas found in the English statutes aforesaid, particularly the statutes of Henry VI, they do not embody all of the features of any of those statutes, and they cannot be said to be an adoption of any of them in their entirety or of any other English statute. It has been repeatedly decided by this court that an action of forcible entry and detainer is a special statutory proceeding summary in its nature and in derogation of the common law, and that our courts do not proceed thereon by virtue of their power as courts of general jurisdiction, but derive their authority wholly from the statute, and in such proceeding they are to be considered and treated as a court of special and limited jurisdiction. (French v. Miller, 126 Ill. 611; Wells v. Hogan, 337; Fitzgerald v. Quinn, 165 Ill. 354.)"

Therefore this action not being one according to the course of the common law nor one in equity, and the statute which we are called upon to construe being highly penal in its nature, and therefore to be construed strictly, we hold that an action of forcible entry and detainer is not a suit at law or in equity within the meaning of the statute, and that this defense was not available. Berkel v. Columbia Clay Works, 192 Fed. 119.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, J.: I agree with the conclusion reached but not in all that is said in the opinion.

McSurely, J.: I concur in the conclusion.

MARRIET FLYNN BOYLE,
Complainant-Appellee,

vs.

JOHN M. SMYTH COMPANY, JOHN M.
SMYTH, MARY A. SMYTH NELSON
and WILLIAM P. SMYTH et al.,
Defendants.

In the Matter of the Petition of
WRIGHTSTILL WOODS (Appellee) for
an Allowance for his Services as
Guardian ad litem.

EDWARD SMYTH PATERA et al.,
Appellants.

24

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE WATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by infant defendants and cross-complainants from an order of the chancellor allowing the sum of \$5,000 as guardian ad litem fees. The entire case has been before this court upon the merits on two separate appeals in General Nos. 31302 and 31303, which were consolidated for hearing and in which appeals opinions have been this day filed reversing the judgment and remanding the cause with directions to enter a decree in conformity with the opinions of this court. The general facts as to the issues involved between the parties to this litigation are there stated, and it will be unnecessary to repeat them here.

The original decree directed that a certificate of interest of 728 shares of common stock of the John M. Smyth Company together with dividends thereon declared should be held by the executrix of the estate of Mary Flynn Smyth, subject to further orders of the court relative to the application of the guardian ad litem for fees and to the interests of the minors during their minority or the minority of either of them, and that the executrix upon completion of her duties should, after the

248 I.A. 633

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY

THE STATE OF ILLINOIS,
COUNTY OF COOK,
VS.
JAMES M. HARRIS,
Defendant.

In the matter of the Petition of
JAMES M. HARRIS (Appellant) for
an order of the Court to
appoint a receiver.

James M. Harris, Plaintiff,
vs.
The State of Illinois, Defendant.

THE COURT OF THE COUNTY OF COOK

DOES hereby certify that the within

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payment of debts of Mary Flynn Smyth and costs and expenses of administration and guardian ad litem's fees, transfer, set over, assign and deliver their receipt or certificate of interest to the adult defendant and cross-complainant, William P. Smyth, and to the minor children of Thomas F. Smyth, deceased, namely, Thomas A. Smyth, Jane Ann Smyth and Rosalie Smyth, in equal parts.

It is urged upon this appeal that this original decree was a final adjudication as to the manner in which the guardian ad litem's fees should be paid, but as that decree has now been reversed and the opinion of the court is in part at least inconsistent with such a finding, it will be unnecessary to further discuss that point. The original decree in the cause was entered August 17, 1926. The petition of the guardian ad litem for fees was pending at that time, and the order from which this appeal is perfected was entered October 7, 1926.

The petition of the guardian ad litem averred his appointment on July 2, 1925, asserted that he had for at least forty-five different days devoted his entire working time of five hours or more each day to the fulfillment of the duties of his office as such guardian ad litem, and averred that the property sought to be taken from the minors was reasonably worth upwards of \$300,000 and asked that the sum of \$10,000 should be paid to him out of the estate of the minors.

Testimony was offered in support of the petition, and upon the hearing Mr. McCulloch, who represents the infant appellants in this appeal, appeared in opposition thereto. Mr. McArdle, the attorney for Harriet Flynn Boyle, was also present. The record shows that Mr. McCulloch made a motion that a second guardian ad litem should be appointed to represent the infant defendants upon the hearing. This motion was denied, the court stating in substance that if a second guardian ad litem were appointed it would probably

payment of fees of Mary Lynn Gayth and costs and expenses of administration and handling of William H. Gayth's estate, set over, assigned and deliver their receipt or certificate of interest to the said William H. Gayth, and to the minor children of Thomas H. Gayth, deceased, namely, Thomas H. Gayth, John Ann Gayth and Charles Gayth, in equal parts.

It is urged upon this appeal that this original decree was a final adjudication as to the manner in which the guardian of William's fees should be paid, but as that decree has now been reversed and the opinion of the court is in part at least inconsistent with such a finding, it will be unnecessary to further discuss that point. The original decree in the cause was entered August 14, 1926. The petition of the guardian ad litem for fees was pending at that time, and the order from which this appeal is portended was entered August 17, 1926.

The petition of the guardian ad litem averred his appointment on July 2, 1925, averred that he had for at least forty-five different days devoted his entire working time of five hours or more each day to the management of the affairs of his office as guardian ad litem, and averred that the property sought to be taken from the minors was reasonably worth upwards of \$200,000 and asked that the sum of \$10,000 should be paid to him out of the estate of the minors.

Testimony was offered in support of the petition, and upon the hearing Mr. William H. Gayth, who represented the infant appeal, appeared in opposition thereto. In this appeal, the record was also present. The record stated that William H. Gayth made a motion that a second guardian ad litem should be appointed to represent the infant defendants upon the hearing. This motion was denied, the court stating its substance that if a second guardian ad litem were appointed it would probably

be necessary to appoint a third to defend the minors against the claim of the second, and so on ad infinitum. The record also shows that Mr. Hamilton Moses, representing Mr. William P. Smyth, one of the children of Thomas M. Smyth, deceased, whose interests are identical with those of Thomas M. Smyth, Jane Ann Smyth and Rosalie Smyth, was also present and agreed that if he were appointed guardian ad litem for the minors he would make no charge for his services as such guardian. Mr. McCulloch made a motion that Mr. Moses be allowed to serve without compensation. but the motion was denied by the court.

The guardian ad litem testified as to the work done by him and two members of the bar, and in response to hypothetical questions placed the value of his services at the amount asked for in the petition. There were motions to strike out this evidence, which were denied, and the court entered an order finding that the guardian ad litem had rendered substantial service and that he was entitled to the sum of \$5,000 as a fair and reasonable compensation for services rendered in the case, and decreed an award to him in that amount, "to be paid to him out of the estate of said minor children, Edward Smyth Patena, Jane Carolyn Patena, Jane Ann Smyth, Rosalie Smyth and Thomas M. Smyth in equal portions." It was further ordered:

"And that John M. Smyth, Mary A. Smyth Nelson and William P. Smyth, said trustees, their survivors and successors, be and hereby are directed to pay said sum of money to Weightstill Woods, Guardian ad litem in this cause out of dividends arising from the shares of common capital stock of the John M. Smyth Company mentioned in this proceeding (other than said 729 shares) which are held for said minors, whether said dividends be now in their hands or hereafter to accrue, or from any other funds in their hands belonging to said minors, until the same shall be fully paid by them or from other funds in the estate of said minors, and to take the receipt of Weightstill Woods, Guardian ad litem, for the sums paid by them on behalf of the minor children in this cause."

It is urged in the first place that the order is void for want of due process of law, but as the infant defendants had

It is urged in the first place that the order is void.

been duly served with process, were in court, and their interests submitted to the protection of the court, and as they seem to have been ably represented by counsel both on the hearing and on this appeal, we think this contention is without merit. As the trial court suggested, it would have been impracticable to appoint a succession of guardians ad litem. The guardian ad litem was appointed by the court, and the power to appoint we think necessarily carries with it the power in the discretion of the court to allow reasonable fees.

It is next contended that the court erred in assessing all of the costs of the guardian ad litem's services against the minor defendants and none against Mrs. Boyle. Hutchinson v. Hutchinson, 152 Ill. 347; Carlberg v. State Savings Bank, 312 Ill. 181, and several other cases are cited to this point. The point would perhaps deserve consideration if the fees allowed were strictly guardian ad litem fees. As a matter of fact the petition and the proofs taken thereunder tend to show that what was really allowed was in the nature of solicitor's fees for the guardian ad litem, and we do not think such fees should be assessed as costs against a losing complainant. A guardian ad litem may, we think, properly act as his own solicitor, and it is believed that such is the usual practice; but when he does so he cannot ordinarily be allowed two separate fees for such services. Baughman v. Baughman, 215 Ill. App. 620. If it were possible to separate the fees of a guardian ad litem from that of his solicitor, this record fails to disclose any attempt to do so, and we do not think that solicitor's fees for the guardian ad litem could have been properly taxed against the losing party in this case. Ames v. Ames, 151 Ill. 280; Hutchinson v. Hutchinson, *supra*; Jones v. Young, 228 Ill. 374.

It is also urged that the fees allowed in this case are excessive. We do not think there can be any doubt that this

been duly served with process, were in court, and their interests
submitted to the protection of the court, and as they were so
have been duly represented by counsel both on the hearing and on
this appeal, we think this contention is without merit. As the
trial court suggested, it would have been inadvisable to ap-
point a successor of Garfield and Ligon. The question of Ligon
was appointed by the court, and the power to appoint we think
necessarily carries with it the power in the discretion of the
court to allow a reasonable fee.
It is next contended that the court erred in appointing
all of the costs of the Garfield and Ligon services against the
other defendants and none against Mrs. H. B. Garfield.
Estabrook, 188 Ill. 347; Garfield, 188 Ill. 347; Garfield, 188 Ill.
181, and several other cases are cited to this point. The point
would perhaps deserve consideration if the fees allowed were
strictly Garfield and Ligon fees. As a matter of fact the position
and the people taken in Garfield tend to show that what was really
allowed was in the nature of collector's fees for the Garfield and
Ligon, and we do not think such fees should be assessed as costs
against a losing defendant. A question of Ligon may, we think,
properly set on his own collector, but it is believed that such is
the usual practice; but when he does so he cannot ordinarily be
allowed the same fees as when he does not. It is true that in
188 Ill. 347, 348, it was held that a collector who recovers fees for
Garfield and Ligon from that of his collector, this recovery tends to
discuss any attempt to do so, and we do not think that collector's
fees for the Garfield and Ligon could have been properly taken
against the losing party in this case. Allen v. Allen, 181 Ill. 520;
Garfield v. Ligon, 188 Ill. 347.
It is also urged that the fees allowed in this case
are excessive. We do not think there can be any doubt that this

is true insofar as the appellants Edward Smyth Patera and Jane Carolyn Patera are concerned. No one was attempting to take any property from them. They were proper parties, having a beneficial interest in the trust agreement under which the entire stock of the John M. Smyth Company had been conveyed to the trustees and the validity of that trust being attacked; but if the trust agreement had been held invalid there would have been no substantial change in their property interests. Moreover, the briefs indicate that this payment is considered by the guardian ad litem as an account and that a further petition for fees is to be hereafter presented. The allowance of \$1,000 each against these minors, we think excessive. As to the appellants Jane Ann, Rosalie and Thomas M. Smyth, Jr., substantial property interests were involved. However, the primary duty of defending was on the trustees of the estate of their father and also upon the trustees under the trust agreement through which they claim; and in the opinion of this court, as will be seen from an examination of our opinion, those trustees misconstrued their own powers and duties with reference to their trusts.

The record shows that there was no disposition on the part of these parties to shirk their responsibilities in this matter and that they provided able counsel, who sought to protect the interest of these minor defendants in every possible way. We think the guardian ad litem did more work than was either wise or necessary for him to do under the circumstances. We have gone over the whole record carefully and are of the opinion that a total allowance of \$3,000 would be sufficient; that \$250 of this amount should be paid out of the estate of Edward Smyth Patera, \$250 out of the estate of Jane Carolyn Patera, and that the remainder of \$2500 should be paid in equal parts by the minor defendants John M., Jr.,

Thomas

to have interest in the appellants Edward Hugh Peters and Jane
Elizabeth Peters and concerned. No one was attempted to take any
property from them. They were proper parties, having a beneficial
interest in the trust agreement under which the entire stock of the
John L. Smith Company had been conveyed to the trustees and the
validity of that trust being attacked; but if the trust agreement
had been held invalid there would have been no substantial change
in their property interests. Moreover, the facts indicate that
this agreement is considered by the parties as an ac-
count and that a further provision for fees is to be provided for
them. The allowance of \$1,000 each against these parties, we
think excessive. As to the appellants Jane Ann, Rosalie and
Thomas M. Smith, Jr., substantial property interests were involved.
However, the primary duty of selection was on the trustees of the
estate of their father and also upon the trustees under the trust
agreement through which they claim; and in the opinion of this court,
as will be seen from an examination of our opinion, those trustees
disinterested their own powers and duties with reference to their
interest.

The record shows that there was no discussion on the
part of these parties to shift their responsibilities in this matter
for and that they executed this document, who sought to protect the
interest of these minor appellants in every possible way. We think
the provision in item the same was either wise or necessary
very far from being an act of oppression. We have gone over the
whole record carefully and one of the trustees has a total allowance
more of \$5,000 would be our estimate; that \$250 of this amount should
be paid out of the estate of Edward Hugh Peters, \$250 out of the
estate of Jane Elizabeth Peters, and that the remainder of \$2,500
should be paid in equal parts by the minor defendants John L., Jr.,

Jane Ann, and Rosalie Smyth; that the order should provide for the payment of the same out of the property of said minors John M., Jr., Jane Ann and Rosalie by the trustees of the estate of Thomas M. Smyth; that the payment of the amount found due from Edward Smyth Patera and Jane Carolyn Patera should be paid out of their respective dividends by John M. Smyth, Mary A. Smyth Nelson, and William P. Smyth, trustees, their survivors or successors.

For the reasons indicated the order of the Circuit court is reversed and the cause remanded with directions to enter an order in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

For the reasons indicated the order of the Circuit Court is reversed and the same remanded with directions to enter an order in conformity with the views herein expressed.

Reference and Notes

ALICE S. DWYER,
Appellant,

vs.

MARGARET O. DWYER, LEO
J. DWYER and LEO P. DWYER,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

The complainant has appealed from a decree which sustained exceptions to a master's report and dismissed her bill for want of equity.

The defendants to the bill were the husband of complainant, Leo P. Dwyer, from whom she is living separate and apart, Margaret O. Dwyer and Leo J. Dwyer, mother and father of the husband of complainant.

The master's report makes findings as to the relationship of the parties and states that a suit for separate maintenance by complainant against her husband was dismissed during the pendency of the cause after the taking of evidence, having been begun before a master in chancery. It finds the material facts to be that the defendant Leo P. Dwyer and the complainant, Alice S., were owners as joint tenants of certain premises described, subject to a trust deed securing a principal indebtedness of \$10,000. A second mortgage for \$15,000 was placed thereon to secure the notes of Leo P. and Alice S. Dwyer for that amount. In March, 1921, Leo P. told complainant he had decided to put the property in the name of his uncle, John C. Mahan, for business reasons, and the uncle would give them back a deed for the property. The complainant then believed her husband absolutely. She said, "I am

giving up my part of the house to your family." He said, "I am giving you back a deed." Thereupon complainant signed the deed to Behan with the understanding that she would get back a deed. This deed to John C. Behan was dated March 24, 1921, and was duly acknowledged by the grantors and recorded. It was a warranty deed, subject to the two trust deeds above described.

On March 25, 1921, John C. Behan executed a warranty deed of the premises to Leo P. Dwyer and complainant as joint tenants, subject to these two trust deeds. The deed was acknowledged and delivered to Leo P. Dwyer, but it was not recorded until July 28, 1925. Behan paid no consideration for the deed, took the title in trust for Leo P. Dwyer and complainant as joint tenants, and Behan had no beneficial interest whatever in the premises. On January 15, 1925, without the knowledge of Alice S. Dwyer, Behan, who was a bachelor, conveyed the premises by quit-claim deed to Margaret C. Dwyer, the wife of Leo J. and mother of Leo P. Dwyer. The deed was acknowledged on January 19 and recorded on January 23, 1925. The existing mortgages were paid off and releases obtained, and a new first mortgage trust deed for the sum of \$15,000 was placed on the premises by Margaret C. Dwyer and Leo J. Dwyer, her husband, on January 23, 1925, and a new second mortgage trust deed for the sum of \$10,000 was placed on the premises by Margaret C. and Leo J. Dwyer on the same date. All these conveyances were made without the knowledge or consent of complainant. No consideration was paid by Margaret C. Dwyer for the conveyance to her, and she took title to the premises in trust for Leo P. and Alice S. Dwyer, as joint tenants. Margaret C. Dwyer had no beneficial interest in the premises. Alice S. Dwyer did not know of the transfer of the property from Behan to Margaret C. Dwyer until February, 1925, when she found an opinion

giving up my part of the house to your family." He said, "I am giving you back a deed." Thereupon complainant signed the deed to Helen with the understanding that she would get back a deed. This deed to John C. Bohan was dated March 26, 1921, and was duly acknowledged by the grantor and recorded. It was a warranty deed, subject to the two first deeds above described.

On March 26, 1921, John C. Bohan executed a warranty deed of the premises to Lee P. Dwyer and complainant as joint tenants, subject to these two first deeds. The deed was acknowledged and delivered to Lee P. Dwyer, but it was not recorded until July 23, 1922. Bohan said no consideration for the deed took the title in trust for Lee P. Dwyer and complainant as joint tenants and that he had no beneficial interest in the premises. On January 12, 1923, without the knowledge of Alice E. Dwyer, Bohan, who was a teacher, conveyed the premises by quitclaim deed to Margaret C. Dwyer, the wife of Lee J. and mother of Lee P. Dwyer. The deed was acknowledged on January 19 and recorded on January 22, 1923. The existing mortgages were paid off and interest stopped, and a new first mortgage was paid for the sum of \$10,000 was placed on the premises by Margaret C. Dwyer and Lee J. Dwyer, her husband, on January 22, 1923, and a new second mortgage placed for the sum of \$10,000 was placed on the premises by Margaret C. and Lee J. Dwyer on the same date. All these conveyances were made without the knowledge or consent of complainant. No consideration was paid by Margaret C. Dwyer for the conveyance to her, and she took title to the premises in trust for Lee P. and Alice E. Dwyer, as joint tenants. Margaret C. Dwyer had no beneficial interest in the premises. Alice E. Dwyer did not know of the transfer of the property from Bohan to Margaret C. Dwyer until February, 1923, when she found an opinion

of title from the Chicago Title & Trust Company showing title in the premises in Margaret O. Dwyer. She raised "quite a hullabaloo" because her husband had promised her that he would not turn the property over to his mother or father without telling her something about it. She said to her husband, "Why did you put this in your mother's name without letting me know anything about it? Why did you not come out and be open about it all?" He replied that he had to have money, his father had to clean up this mortgage, that was why he turned it over. The complainant found the deed from Behan to her husband and herself in his safety deposit box in June, 1924, and she took it to a lawyer and afterwards to her present counsel, who recorded it on July 28, 1925.

The complainant was induced by her husband and his father to join in executing and acknowledging and delivering a quit-claim deed of the premises to Margaret O. Dwyer on August 6, 1925. This deed was dated and acknowledged August 6, 1925, and was recorded August 11, 1925, and on August 6, 1925, Leo J. Dwyer told her, in the presence of Leo P. Dwyer, that he would give her an agreement that if she would sign the quit-claim deed to Margaret O. Dwyer nothing would be done with the equity until complainant would get her share. Complainant said, "What about Mrs. Dwyer? She owns the house now." Leo J. Dwyer said that Mrs. Dwyer didn't want anything. Complainant said, "As I understand it, my husband has put it in his mother's name and away from me and Elizabeth" (the daughter of Leo P. and Alice S.) Leo J. Dwyer said, "If anything happened to Leo, my son, Mrs. Dwyer (Margaret O.) would not take anything belonging to you all." On that date Leo J. Dwyer gave complainant a written agreement signed by him and acknowledged before a notary public, as follows:

"I hereby agree that there will be no disbursement of the equity in the sale of No. 164 Oxford Road, Kenilworth, Illinois, until agreed upon by Alice S. Dwyer, her husband, Leo P. Dwyer, and Leo J. Dwyer."

When this agreement was handed to the complainant she said that it did not mention anything about Mrs. Dwyer. Leo J. Dwyer said, "That don't make a particle of difference. I represent Mrs. Dwyer. Anything I do is agreeable to her. She does not want anything."

On August 9, 1925, Margaret C. Dwyer and Leo J. Dwyer, her husband, conveyed the premises to Florence Porter Sullivan by warranty deed, subject to the trust deed indebtedness of \$15,000 and \$10,000 placed thereon by Margaret C. Dwyer. The deed was acknowledged by the grantors on August 12, 1925, and was recorded August 14, 1925, and recites a consideration of "Ten dollars and other good and valuable considerations in hand paid." The record does not show what the actual consideration paid was, but in view of the allegation in the bill and admission in the answer as to the value of the property being \$30,000, the master was of the opinion and found that the consideration should be taken and held to be \$30,000; that Margaret C. Dwyer and Leo J. Dwyer should be required to account for that amount.

On September 1, 1922, the premises in question were rented by Leo P. Dwyer to Frederick M. Bowes for \$250 a month and Mr. Bowes was in possession of the property from September 1, 1922, up to and including April 30, 1925; in all \$7,000 was paid by arrangement between Leo P. Dwyer and others to be applied on the mortgage on the property. Alice S. Dwyer received none of the rents from the premises and she received no money from the sale of the property. She received no money from Behan when the property was transferred to him and no money from the mortgages placed thereon by Margaret C. Dwyer and Leo J. Dwyer. She received no money from Margaret C. Dwyer when the property was transferred to her. In the latter part of August, 1925, when complainant asked Leo J. Dwyer, in the presence of Leo P. Dwyer, for part of the money, Leo J. Dwyer said he could not do anything until her

When this agreement was made in the complaint she said that it did not mention anything about Mrs. Byer, Lee J. Byer said, "What was a mistake at all?" I remember Mrs. Byer, anything I do is responsible for her. She does not want anything."

On August 2, 1935, Margaret G. Byer and Lee J. Byer, her husband, conveyed the premises to Alexander Porter Sullivan by warranty deed, subject to the first deed of mortgage of \$15,000 and \$15,000 placed thereon by Margaret G. Byer. The deed was recorded by the grantors on August 12, 1935, and was recorded August 14, 1935, and recited a consideration of "Ten dollars and other good and valuable considerations in hand paid." The record does not show what the actual consideration paid was, but in view of the allegations in the bill and admission in the answer as to the value of the property being \$50,000, the reciter was of the opinion and found that the consideration should be taken and held to be \$50,000; that Margaret G. Byer and Lee J. Byer should be required to account for that amount.

On September 1, 1935, the premises in question were rented by Lee J. Byer to Frederick H. Brown for \$250 a month and Mr. Brown was in possession of the property from September 1, 1935, up to and including April 30, 1936; in all \$7,500 was paid by arrangement between Lee J. Byer and others to be applied on the mortgage on the property. Alice M. Byer received none of the rents from the premises and she received no money from the sale of the property. She received no money from when the property was transferred to him and no money from the mortgage placed thereon by Margaret G. Byer and Lee J. Byer. She received no money from Margaret G. Byer when the property was transferred to her. In the latter part of August, 1935, when complaint asked Lee J. Byer, in the presence of Lee J. Byer, for part of the

husband gave him permission. Leo P. Dwyer then said that she was not entitled to a cent of it, that she would not get a cent of it.

The master states that it is significant that none of the defendants testified in the case. He finds a fiduciary relation between Leo P., Leo J., and Margaret C. Dwyer and Alice S. Dwyer, and that Leo P., Leo J. and Margaret C. Dwyer abused this fiduciary relation to the loss of Alice S. Dwyer. The master concluded that Margaret C., Leo J. and Leo P. Dwyer should account to Alice S. Dwyer for one-half the value of the equity in the property as of September 1, 1925.

The master further stated an account between the parties showing a balance of \$13,975.34, of which one-half or \$6937.67, was found to be due to the complainant. For this sum he found Margaret C., Leo J. and Leo P. Dwyer jointly and severally personally liable to the complainant, with interest thereon at the rate of five per cent from September 1, 1925, and that complainant was entitled to a money decree against Margaret C., Leo J. and Leo P. Dwyer. He further found that Leo P. Dwyer was liable to complainant for the additional sum of \$147, being one-half of the rents aggregating \$294 paid to Leo P. Dwyer, together with interest thereon at the rate of five per cent per annum from September 1, 1925, and that complainant was entitled to a money decree against Leo P. Dwyer for that sum, together with interest.

Although the defendants did not testify in their own behalf nor offer any evidence, they filed twenty-three objections to the master's report. By stipulation these objections stood as exceptions upon the hearing before the chancellor. The master overruled all the objections; the chancellor, apparently, sustained all the exceptions. The defendants insist the decree should be affirmed, in the first place because the court of equity was without jurisdiction. That defense, however, seems to be urged here for the

husband gave him \$100.00. The \$100.00 was not entitled to a cent of it, that she would not get a cent of it.

The master states that it is slightly different than that of the defendant testified in the case. He finds a fiduciary relation between Lee P., Lee J., and Margaret O. Dwyer and Alice B. Dwyer, and that Lee P., Lee J. and Margaret O. Dwyer shared this fiduciary relation to the loss of Alice B. Dwyer. The master concludes that Margaret O., Lee J. and Lee P. Dwyer should account to Alice B. Dwyer for one-half the value of the equity in the property as of September 1, 1914.

The master further stated an account between the parties also showing a balance of \$13,076.34, of which one-half or \$6,538.17 was found to be due to the complainant. For this sum he found Margaret O., Lee J. and Lee P. Dwyer jointly and severally personally liable to the complainant, with interest thereon at the rate of five per cent from September 1, 1915, and that complainant was entitled to a money decree against Margaret O., Lee J. and Lee P. Dwyer. He further found that Lee P. Dwyer was liable to complainant for the additional sum of \$117, being one-half of the costs of the suit as well as Lee P. Dwyer, together with interest thereon at the rate of five per cent from September 1, 1915, and that complainant was entitled to a money decree against Lee P. Dwyer for that sum, together with interest.

Although the defendants did not testify in their own behalf nor offer any evidence, they filed twenty-three objections to the master's report. By stipulation these objections stood as exceptions upon the hearing before the chancellor. The master overruled all the objections; the chancellor, apparently, sustained all the exceptions. The defendants insist the decree should be affirmed, in the first place because the court of equity was without jurisdiction. That defense, however, seems to be urged here for the

first time. It is not set up in the answer, nor indeed was any specific objection made on that ground either before the master or the chancellor. We think the defendants cannot urge it now, although we think it would have been unavailing even if it had been raised on the facts in this case. Bagge v. Bagge, 41 Ill. 500; Crawford v. Schmidt, 139 Ill. 564; Stout v. Cook, 41 Ill. 447; Daniell's Chancery Practice, 551-555.

The defendants also contend that there was no trust or trust relation involved in the case; that the record fails to disclose the elements necessary to create a constructive trust or a resulting trust, and that no fiduciary relation existed between complainant and defendant. It is unnecessary to discuss these questions at length, since the prayer of the bill was for an accounting and the record discloses that the equities of the parties were such that complainant was entitled thereto.

It is urged that the proof was insufficient to establish that the value of the real estate involved was \$30,000, but this was alleged by the bill and practically admitted by the answer. Langlois v. Stewart, 156 Ill. 609; Story's Equity Plead. 452; 31 Cyc. 200. This was a matter peculiarly within the knowledge of the defendants, and being alleged in the bill, a full and complete denial would be required by the defendants in order to put the matter in issue.

We think the evidence being undisputed and the conditions of the pleading being such as appear from the record, the chancellor erred in sustaining the exceptions to the master's report. The decree will therefore be reversed and the cause remanded with directions to over-rule the exceptions and enter a decree in conformity with the report of the master.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

First time, it is not set up in the answer, nor indeed was any specific objection made as that grows either before the master or the chancellor. We think the defendant cannot say it now although we think it would have been revealing even if it had been raised on the facts in this case. Harris v. Harris, 31 Ill. 2d 607, 1978 IL App. (1) 78-0001, 36 Ill. App. 3d 100, 341 N.E.2d 447.

Dallas County District Court, Dallas, Texas.

The defendant also contended that there was no trust or fiduciary relation involved in the case; that the record fails to disclose the elements necessary to create a constructive trust or a resulting trust, and that no fiduciary relation existed between defendant and defendant. It is unnecessary to discuss these questions at length, since the purpose of the bill was for an accounting and the record discloses that the equities of the parties were such that complainant was entitled thereto.

It is urged that the pool was established to establish the value of the pool estate involved was \$50,000, and this was alleged by the bill and practically admitted by the answer.

would be required by the defendant in order to put the matter in a

It is noted that the evidence being submitted and the contents of the pleading being made on appeal from the record, the decision was in sustaining the exception to the master's report. The same will therefore be reversed and the same remanded with directions to over-rule the exception and enter a decree in conformity with the report of the master.

WILLIAM H. CUMMINS,
Appellee,

v.

THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILWAY COMPANY,
Appellant.

)
)
) Appeal from Superior Court,
)
) Cook County.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause is now before us on a rehearing granted. The action in the trial court was by the plaintiff Cummins against the defendant corporation and was in case.

The plaintiff was employed by the defendant, a common carrier, engaged in interstate commerce, and on November 28, 1925, while in the course of his employment, was injured through the negligence of the defendant in failing to comply with certain acts of Congress known as the Federal Employers' Liability Act and the Federal Safety Appliance Act. There was a trial by jury and a verdict of \$25,000, upon which the court entered judgment.

The defendant here and on the trial admits liability. The evidence was directed solely to the question of damages, and the only point urged for reversal is that the verdict was excessive and the result of passion and prejudice.

No evidence was offered in behalf of the defendant. The proof tends to show that at the time of the accident, plaintiff was employed by defendant as a freight conductor and "extra passenger man." Plaintiff was then fifty-eight years of age. This was not his first accident. He says that he was at one time knocked between two cars by an overhead bridge but was not hurt. The date of that particular injury does not appear, but in 1911 the top grab iron on a car broke and let him fall back onto the ground against the pilot of an engine and some

Appeal from Superior Court,
Cook County.

THE CHICAGO, ROCK ISLAND
AND PACIFIC RAILWAY COMPANY,
Appellant.
vs.
WILLIAM E. GUNNING,
Appellee.

MR. PRESIDING JUSTICE MATHIAS: THE OPINION OF THE COURT.

This cause is now before us on a rehearing granted. The action in the trial court was by the plaintiff Gunning against the defendant corporation and was in case.

The plaintiff was employed by the defendant, a common carrier, engaged in interstate commerce, and on November 22, 1928, while in the course of his duties, was injured by the negligence of the defendant in failing to comply with certain acts of Congress known as the Federal Employers' Liability Act and the Federal Safety Appliance Act. There was a trial by jury and a verdict of \$25,000, upon which the court entered judgment.

The defendant here and on the trial sought liability. The evidence was directed solely to the question of damages, and the only point raised for reversal is that the verdict was excessive and the weight of evidence and proof.

No evidence was offered in behalf of the defendant. The proof tends to show that at the time of the accident, plaintiff was employed by defendant as a freight conductor and "extra passenger" and plaintiff was then fifty-eight years of age. This was not his first accident. He says that he was at the time knocked between two cars by an overhead bridge and was not hurt. The date of that witness injury does not appear, but in 1911 the top was from an car broke and he was killed when the ground against the pilot of an engine and some

brakes. In that accident three ribs on his left side were broken, and he was laid up for two or three weeks. He was in another accident in 1913, when a torpedo exploded and cut the eyeball of one of his eyes, practically destroying the sight in that eye. At the time of that accident, the end of his nose was cut off, a hole put through it, and he received scars on his face and head. As a result of that accident he was away from his usual work from January until June 4th following, after which he resumed active service. He is a large man, and at the time of receiving the injuries of which he now complains, November 28, 1925, weighed from 195 to 197 pounds. At the time of the trial he weighed 200 pounds. He is about 5 feet 9½ inches tall. His monthly earnings from November, 1924, to November, 1925, inclusive, varied from \$136.81 to \$232.29.

At the time of the injury plaintiff lived in Blue Island. He was injured at about 6:25 a.m. He was acting as a conductor of a train of about 65 freight cars to which a caboose was attached. He was in the caboose, the train was moving easterly and he faced toward the west, watching, as he says, to protect the train from a through passenger train. He says:

"The engineer ran by the switches and had to back up in order to head in the yards again. As he started to head in, the eyes of the draw bar, nine cars from the engine, pulled out of a Rock Island car, causing the train to go into emergency and throwing me backward against the steps that lead from the floor to the cupola of the caboose, with my back against it."

The train was moving from eight to ten miles an hour. The steps to the cupola led up to the center of the car and were about six feet from where plaintiff was standing. His back struck against the steps and he went to the floor. Coal and other stuff were thrown over him, but he managed to get up, whether with or without aid, he is not sure. The passenger train was coming and he could see the headlight. Plaintiff says he was in great pain and started for home. He got off the train right then before it moved and went up alongside of the train. He stepped down off the caboose onto the ground and walked alongside

prison. In that accident three ribs on his left side were broken, and he was laid up for two or three weeks. He was in another accident in 1913, when a torpedo exploded and cut the spinal of one of his eyes, practically destroying the sight in that eye. At the time of that accident, the end of his nose was cut off, a hole put through it, and he received scars on his face and head. As a result of that accident he was away from his usual work from January until June 4th following, after which he resumed active service. He is a large man, and at the time of receiving the injuries of which he now complains, November 23, 1922, weighed from 155 to 167 pounds. At the time of the trial he weighed 200 pounds. He is about 5 feet 5 inches tall. His monthly earnings from November, 1922, to November, 1923, inclusive, varied from \$125.01 to \$128.22.

At the time of the injury plaintiff lived in Blue Island. He was injured at about 6:30 a.m. He was acting as a conductor for a train of about 25 freight cars to which a caboose was attached. He was in the caboose, the train was moving easterly and he faced toward the west, standing, as he says, to protect the train from a through passenger train. He says:

"The engineer was by the switches and had to back up in order to head in the yards again. As he started to head in, the engine of the train, nine cars from the engine, pulled out of a track island car, backing the train to go into way and throwing me backward against the stop that held the floor to the engine of the caboose, with my back against it."

The train was moving from right to left when he fell. The steps to the engine led up to the corner of the car and were about six feet from where plaintiff was standing. His back struck against the steps and he went to the floor. Head and other parts were thrown over his head and he remained in that position until he was picked up. The passenger train was moving west and the freight train, as he says, was in front of the passenger train. The freight train moved and went up alongside of the train. He stepped down off the caboose onto the ground and walked alongside

of the train. He left his grip in the caboose and another employee threw it off when he passed the flagman. The caboose passed by plaintiff at the time the grip was thrown off and he had walked a distance of about two blocks by that time.

Plaintiff's home was in Grove street in Blue Island about two blocks from the Rock Island tracks, and he walked home which was about $4\frac{1}{2}$ blocks from the place where he was injured. His wife called Dr. A. B. Snyder, defendant's doctor at Blue Island, and plaintiff was taken to the St. Francis Hospital at that place. He was at the hospital at 7:25 a.m. and at ten o'clock X-ray pictures were taken.

Dr. Snyder ordered that hot water bottles should be applied to plaintiff's back and directed that an alcohol bath should be given him twice a day. These directions were followed and that was all that was done until four weeks later. Plaintiff was informed by Dr. Snyder that the X-ray pictures "showed nothing; that there was nothing wrong with my back; it was not broken and the alignment was all right."

At the end of this time more X-ray pictures were taken and a body cast put upon plaintiff. These pictures were taken by Dr. Huntington at the hospital. The body cast was clear up under plaintiff's arms and clear down his hips. After the cast was put on he stayed at the hospital for 28 days and then went home. He wore the first cast 40 days in all. During a part of this time he was up and about. After the cast was taken off he received seven electric treatments from Dr. Snyder, one every other day. For that purpose plaintiff went to Dr. Snyder's office, which was about $4\frac{1}{2}$ blocks from his home. He says, however, that he was not able to walk about at that time, but that his wife took him to the doctor's office. He was able to get up to Dr. Snyder's office when he got there in a car and that in bad weather he called a taxicab. After the electric treatments another cast was ordered.

Plaintiff was sent to the office of Dr. Plummer, the chief surgeon of the defendant company. Dr. Plummer was away and his assistant, Dr. Hanson, took care of plaintiff. By Dr. Hanson's orders plain-

of the train. He left his grip in the baggage and another employee threw it off when he passed the baggage. The baggage was passed by him. At the time the grip was thrown off and he had walked a distance of about two blocks by that time.

Plaintiff's home was in Grove street in Mine Island about two blocks from the Rock Island tracks, and he walked home which was about 4 blocks from the place where he was injured. His wife called Dr. A. E. Sawyer, defendant's doctor at Mine Island, and plaintiff was taken to the St. Francis Hospital at that place. He was at the hospital at 7:30 a.m. and at ten o'clock X-ray pictures were taken.

Dr. Sawyer ordered that hot water bottles should be applied to plaintiff's back and directed that an alcohol bath should be given him twice a day. These directions were followed and that was all that was done until four weeks later. Plaintiff was returned by Dr. Sawyer that the X-ray pictures showed that the injury was serious and that with my back; it was not broken and the defendant was all right.

At the end of this time the defendant was taken to the hospital and upon plaintiff's back. These pictures were taken by the defendant at the hospital. The body cast was taken up under plaintiff's arms and after about his hips. After the cast was put on he stayed at the hospital for 30 days and then went home. He wore the first cast for 30 days in all. During a part of this time he was up and about. After the cast was taken off he received seven electric treatments from Dr. Sawyer, one every other day. Now that defendant plaintiff went to Dr. Sawyer's office, which was about 4 blocks from his home. He said, however, that he was not able to walk about at that time, but that his wife took him to the doctor's office. He was able to get up to Dr. Sawyer's office when he got there in a car and that in bad weather he called a taxi. After the electric treatments and the cast was taken off, plaintiff was sent to the office of Dr. Sawyer, the chief surgeon at the Rock Island company. Dr. Sawyer was away and his assistant, Dr. H. H. Sawyer, took care of plaintiff. Dr. H. H. Sawyer, a former physician,

tiff went to Dr. Potter's X-ray laboratory and three pictures were taken. Dr. Hanson ordered another cast put on, the same as the first one, and plaintiff stayed in the hospital ten days after that and then went home. Once after that time he went back and saw Dr. Snyder, about March 10, 1926. Afterwards he was sent by his attorneys to Dr. J. C. O'Malley, who removed the cast and put a brace on him, and this brace plaintiff was wearing at the time of the trial. Dr. O'Malley also had three or four X-ray pictures taken at Vaughan's laboratory, and a few days prior to the trial other pictures were taken at Potter's laboratory. Plaintiff was sent to Potter's laboratory by Dr. Magnusen, a bone specialist, who testified as an expert in the case.

The testimony tends to show that plaintiff can get around when he has the brace on and that the brace gives him some relief. He says, however, that he cannot stoop over to put on or lace his shoes or wash his feet; that his wife does all that for him; that his back will not permit him to stoop; that he is stiff and sore right in the small of his back, right on the hip bone.

When he testified at the trial on April 26, 1927, he carried a cane and seemed to walk with a limp, and plaintiff said this was the way he walked all the time ever since he came out of the hospital. He says instead of getting better the injury was getting worse; that at times it would be better than at other times; that the trouble he suffered was due to pains in his back and nowhere else; that the pain was all over and not on either side of his backbone; that it came clear up in his neck and head and got into the right side of his head; that the pain in his head was not constant; that sometimes it would be for a week steady, then maybe he wouldn't have it for a week; that the pain in his back was right on the backbone at the coupling.

He testified that he bought a thermos light to use on his back, took a prescription of tablets; that the thermos light was an electric light of 200-watt power and that it was to heat his back the same as a hot water bottle or an electric pad.

Plaintiff has not worked since his injuries. He has not

...the first one, and ...
 ...the hospital ten days after that and then went ...
 ...after that time he went back and saw Dr. ...
 ...November 10, 1935. Afterward he was sent by his attorneys to Dr. J. C. ...
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 ...plaintiff was wearing at the time of the trial. Dr. O'Malley also had ...
 ...three or four X-ray pictures taken at Vaughan's laboratory, and a few ...
 ...days prior to the trial other pictures were taken at Potter's laboratory. ...
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 ...specialist, who testified as an expert in the case. ...
 ...The testimony tends to show that plaintiff did not get around ...
 ...was in the place on and that the brace given him was useful. He ...
 ...saw, however, that he cannot stoop over to put on or take his shoes ...
 ...with his feet; that his wife does all that for him; that his back ...
 ...will not permit him to stoop; that he is stiff and sore right in the ...
 ...small of his back, right on the hip bone. ...
 ...When he testified at the trial on April 22, 1937, he testified ...
 ...a cast and seemed to walk with a limp, and in his testimony was the ...
 ...and he missed all the time ever since he came out of the hospital. He ...
 ...was instead of getting better the injury was getting worse; that at ...
 ...times it seems to bother him at other times; that the trouble he ...
 ...understand was due to pains in his back and nowhere else; that the pain ...
 ...was all over and not on either side of his backbone; that it came clear ...
 ...up in his neck and head and got into the right side of his head; that ...
 ...the pain in his head was not constant; that sometimes it would be for a ...
 ...week steady, then maybe he wouldn't have it for a week; that the pain in ...
 ...his back was right on the backbone at the coupling. ...
 ...He testified that he bought a Thomas light to use on his ...
 ...back, but a physician at plaintiff's home told him that light was not ...
 ...suitable light for plaintiff's back and that it was to make the back ...
 ...more so - that light light is not suitable. ...
 ...Plaintiff has not worked since his injury. He has not

attempted to do so. His testimony tends to show that prior to receiving the injuries he was in good health and good physical condition and without the pains which he described.

Dr. Vaughan testified as a medical expert. He says that he made his first examination on June 19, 1926, and then discovered a well marked lordosis, that is, an incurving of his back in the lumbar or lower region, a spasm of the muscles on both sides of the spine, and a tenderness which was not an objective symptom; that the spine was also deviated to the right at the lower lumbar region. Translating the X-ray pictures, he says:

"We also see here the 5th, 4th, 3rd, 2nd and 1st lumbar vertebrae, and also the pelvis; the tube was in front of the patient, centered about opposite the interval between the fourth and fifth vertebrae. There are seen a healed fracture of the left transverse process of the fifth lumbar vertebrae; there is another fracture of the left lateral process of the fourth lumbar vertebrae. On the left transverse process of the third vertebrae there is a slight deformity, but not marked enough so that I would be able to diagnose a fracture just from that. The whole spine is tilted to the right side, and also twisted. One sees the twist because these spinous processes which lie right underneath the skin of the back should normally run right up in a middle line, but here they are seen to be twisted off to the left side as the whole spine is tilted to the right. The main part of the tilting seems to occur at the junction between the fourth and fifth lumbar vertebrae. Beside that there is also a twisting--a rotation of the vertebrae above this level, which appears from the fact that the dorsal spines are not in the mid-line as they should be. The other picture of the spine shows the same thing and shows a little lifting fracture at the upper margin of the right hip socket at this point; that shows in both pictures."

Dr. Vaughan further testified that the pictures of June 26th indicated an old standing arthritis, which in plain language is articular rheumatism, and he said the effect of violence upon such an arthritic condition would be to hasten the progress of the disease; that many people have the beginning of arthritis at the age of forty years; that they may have it without pain or discomfort or any of the disabilities and be unaware of it.

In response to a hypothetical question he stated that, assuming the facts to be true, it was his opinion, "based upon a medical certainty, and from a reasonable and probable standpoint, that the injury was sufficient to have produced the results assumed. Assuming the hypothetical facts to be true, I think the condition is permanent."

This witness also stated that the spinous processes were

...to be 50 years. His testimony goes to show that prior to receiving
the injuries he was in good health and good physical condition and
about the pains which he described.
Dr. Vaughan testified as a medical expert. He says that he
made his first examination on June 15, 1935, and then discovered a well-
marked tenderness, that is, an insensibility of his back in the lumbar or
lower region, a spasm of the muscles on both sides of the spine, and a
tenderness which was not an objective symptom; that the spine was also
tended to the right of the lower lumbar region. Translating the X-ray
pictures, he says:

"We also see here the 4th, 5th, 6th and 7th lumbar
vertebrae, and also the pelvis. The mass was in front of the pelvis,
resting about opposite the interval between the fourth and fifth vertebrae.
There are seen a marked tenderness of the left transverse process
of the fifth lumbar vertebra; there is another tenderness of the 4th
transverse process of the fourth lumbar vertebra. On the left transverse
process of the fifth vertebra there is a slight tenderness, but not
marked enough so that I would be able to diagnose a fracture just from
that. The whole spine is tilted to the right side, and also twisted.
The first because these spinous processes which lie right under-
neath the skin of the back should normally run right up in a middle line.
It now they are seen to be tilted off to the left side as the whole
spine is tilted to the right. The main part of the tilting seems to
be at the junction between the fourth and fifth lumbar vertebrae.
It seems that there is also a twisting--a rotation of the vertebrae shown
at the level, which appears from the fact that the dorsal spines are not
in a straight line but they should be. The other picture of the spine shows
at least three and shows a little tilting fracture of the upper right
of the right hip which at this point; that shows in both pictures."

Dr. Vaughan further testified that the picture of June 28th
indicated an old standing arthritis, which in plain language is arthritis
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condition would be to hasten the progress of the disease; that many
people have the beginning of arthritis at the age of forty years; that
they may have it without pain or discomfort or any of the disabilities

...of it.
In response to a hypothetical question he stated that,
assuming the facts to be true, it was his opinion, "based upon a medical
testimony, and from a reasonable and probable standpoint, that the injury
was sufficient to have produced the result as assumed. Assuming the
medical facts to be true, I think the condition is permanent."
This witness also stated that the witness processes were

healed, and when asked on cross-examination to state, such being true, what else there was about the plaintiff that was not healed, replied: "His spine is still tilted and twisted, and he has an exaggeration of his chronic arthritis."

The witness further said that an accident such as occurred would produce such a tilting as found if the muscles were torn on one side; that the muscles on the other side became predominant and would hold the spine over on that side.

The witness further said that in his opinion the prior injury which plaintiff sustained in 1913, when his ribs were broken, would not suffice to produce the tilting of the character found; that the rotation tends to but does not always accompany a tilted spine; that the rotation in plaintiff's case was about one-third of a right angle; that arthritis was not unusual in people approaching sixty years of age; that it was a progressive trouble and difficult to arrest; that whatever disability resulted from the accident was due primarily and principally to the spraining of the muscles or the breaking or tearing or stretching of the muscles, rather than to the fracture of the spinous process. The witness explained that when he spoke of the condition as permanent he meant the spinal deformity was permanent, the tilting of the spine to the right, in line with rotation, and the arthritis were permanent.

In response to a similar hypothetical question Dr. Magnusen testified that an injury which was severe enough to fracture the transverse processes due to a direct blow was severe enough to cause the symptoms which a man, who was in the condition plaintiff was in, would have. This witness further said that an arthritic spine healed more slowly than a normal spine in a large majority of cases, but after a man passed fifty years it did not heal as fast as before; that plaintiff's condition was sufficient to cause pain; that the muscle spasm was simply an evidence of nature trying to protect the sore area; that it was different from the involuntary hardening of the muscles; that it was not

...and when asked an examination to state, such being true, that also there was about the plaintiff that was not healed, replied: His spine is still stiff and twisted, and he has an exaggeration of his chronic arthritis."

The witness further said that an accident such as occurred would produce such a tilting as found in the spine were torn on one side; that the muscles on the other side become prominent and would hold the spine over on that side.

The witness further said that in his opinion the injury which plaintiff sustained in 1911, was of the type which would be likely to produce the tilting of the spine, and that the tilting of the spine was not always permanent, but that in plaintiff's case it was permanent, and that it was a progressive trouble and difficult to correct, that whatever disability resulted from the accident was permanent and tilting of the spine, or the twisting or the twisting or twisting of the spine, rather than to the twisting of the spine process. The witness testified that when he spoke of the condition as permanent he meant the tilting of the spine was permanent, the tilting of the spine to the right, in line with motion, and the arthritis were permanent.

In response to a similar hypothetical question Dr. Mayhew testified that an injury which was severe enough to fracture the transverse processes due to a direct blow was severe enough to cause the tilting of the spine, and that the condition plaintiff was in, would last. This witness further said that an arthritis spine healed more slowly than a normal spine in a large majority of cases, but after a man reached fifty years of age he did not heal as fast as before; that plaintiff's condition was not permanent to cause pain; that the muscle spasm was always an evidence of nature trying to protect the nerve root; that it was

possible for a man to harden one of a group of muscles and not harden the others, and that this was due to rotation from somewhere along the path of the nerves; that whether the condition would remain as it was or get progressively worse depended largely on condition; that he had seen patients get better even when at plaintiff's age; that some stayed the same and some got worse; that he thought that with rest in bed and support under the lumbar region and traction on the legs and prolonged rest, the man would probably have some improvement; that the condition of such a man as plaintiff would prevent him from actively engaging in railroad service.

The witness further said:

"If these ligaments get well, the man is well, because the disability is now in the ligaments; the bone is healed. It is always true that the bones heal long before the ligaments do. This man's troubles are in the ligaments alongside the backbone; so far as the bone is concerned, it is united."

The witness further said that chances were that it would stay about the same as it was; that with treatment it might ^{im}prove some; that without treatment it might get worse.

The briefs call our attention to numerous cases in some of which damages have been held to be excessive and in others not excessive. The defendant calls particular attention to Central of Ga. Ry. Co. v. Robertson, 91 So. 470, where the plaintiff was a young man of twenty-one years of age. There was evidence in that case of the fracture of one of the transverse processes of the vertebrae, and plaintiff testified that he continued to have pain in that region when he bent over. In that case a verdict for \$19,000 was reduced by the Supreme court to \$12,000.

Defendant also cites Brook v. C. R. I. & A. Ry. Co., 266 S. W. 692. The plaintiff there was a younger man and the injuries sustained much more severe, although very similar in character to those suffered by the plaintiff here. The judgment there was for \$20,000, and the court required a remittitur of \$5,000.

Kowaleki v. C. & N. W. Ry. Co., 199 N. W. 178, is also cited, a case where the medical testimony failed to establish that the injuries were permanent, the cause having been tried within five months of the

available for a number of years, and it is not possible to say whether the condition was due to rotation from somewhere along the path of the nerves; that whether the condition would remain as it was or if progressively worse depended largely on condition; that he had seen patients get better even when at plaintiff's age; that some stayed the same and some got worse; that he thought that the condition was not a disease of the lower region but was due to the condition of the spine as a whole; that he thought that the condition of which a man is afflicted would prevent him from actively engaging in railroad service.

The witness further said:

"It is my opinion that the man is not well, the man is well, because the ability is not in the ligaments; the bone is broken. It is always true that the bones are not long before the ligaments do. This man's condition is in the ligaments outside the backbone; so far as the bone is concerned, it is all right."

The witness further said that chances were that it would stay in

about the same as it was; that with treatment it might prove some; that

if that treatment is not given, it might get worse.

The witness said that he was not a doctor, but he was a chiropractor.

Changes have been made to be descriptive and in other not unimportant. The

defendant calls attention to the fact that the plaintiff is a young man of about the years of age.

Pl. 30, 470, where the plaintiff was a young man of about the years of age.

There was evidence in that case of the testimony of one of the witnesses

procurement of the vertebrae, and plaintiff testified that he continued to

have pain in that region when he bent over. In that case a verdict for

\$12,000 was returned by the jury, and the court set it at \$12,000.

Defendant also calls attention to the fact that the plaintiff is a young man of about the years of age.

Pl. 30, 470, where the plaintiff was a young man of about the years of age.

There was evidence in that case of the testimony of one of the witnesses

procurement of the vertebrae, and plaintiff testified that he continued to

have pain in that region when he bent over. In that case a verdict for

\$12,000 was returned by the jury, and the court set it at \$12,000.

Defendant also calls attention to the fact that the plaintiff is a young man of about the years of age.

injuries and a verdict for \$15,000 returned, the court required a remittitur of \$5,000. On the other hand, the plaintiff calls our attention to many cases of personal injuries in this and other states where much higher judgments have been sustained. Our attention is particularly directed to Kavale v. Morton Salt Co., 242 Ill. App. 206, where a judgment for \$31,000 was held not to be excessive. Particular cases, however, are of little value in considering a question of this kind. The amount of damages to be allowed is peculiarly within the province of the jury which has advantages in seeing and hearing witnesses which a court of review does not possess. Many recent decisions of this court have pointed to the controlling fact that the purchasing power of the dollar has decreased materially in recent years. However, cases of this kind appeal very strongly to the sympathies of jurors and, we may add, sometimes of courts. There is a duty upon courts of review to protect defendants from excessive verdicts which may be rendered as a result of sympathy rather than of a close observation of the facts. Our former opinion in this case was by a divided court, and the petition for a rehearing convinced us that our approval of the judgment entered was based upon a theory of total disability which the evidence does not sustain. Upon a further consideration, we have reached the conclusion that the judgment entered was excessive in the amount of \$5,000. If the plaintiff will within ten days remit from the judgment that amount, the judgment will be affirmed, otherwise reversed and remanded for another trial.

APPROVED UPON REMITTITUR OTHERWISE REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

...and a verdict for \$10,000 to him. The court required a
...on the other hand, the plaintiff's only other
...in many cases of personal injuries in this and other states where
...much higher amounts have been awarded. Our attention is particularly
...directed to Kovale v. ..., 242 Ill. App. 300, where a judgment
...\$11,000 was held not to be excessive. ... cases, however, and
...of injury cases in considering a question of this kind. The amount of
...to be allowed is ... within the province of the jury which
...and hearing witnesses which a court of review
...and ... of this court have pointed to
...the established fact that the purchasing power of the dollar has decreased
...materially in recent years. However, cases of this kind are very
...to the question of injury and, we say, ... of
...there is a duty upon courts of review to protect defendants from
...which may be rendered as a result of sympathy
...of a claim ... of the facts. Our former opinion in this
...and the petition for a rehearing denied
...of the judgment entered was based upon a theory of
...which the evidence does not sustain. Upon a further
...we have reached the conclusion that the judgment entered
...of \$10,000. If the plaintiff will within
...the judgment that amount, the judgment will be
...and remanded for another trial.
...REVEREND AND HONORABLE JUDGES ...

BARTHOLOMAY-DARLING CO.,
a Corporation,
Appellee,

vs.

E. H. DAVIS & CO., a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE LATCHETT
DELIVERED THE OPINION OF THE COURT.

In this case the defendant has appealed from a judgment in the sum of \$1049.85 entered in favor of the plaintiff upon the finding of the court. The bill of exceptions has heretofore been stricken, and the only errors assigned and argued in the brief of appellant are based upon the bill of exceptions, which has been stricken.

This being the condition of the record, it follows that the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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姓名: 王德胜 性别: 男 年龄: 45 职业: 教师 籍贯: 山东烟台 民族: 汉族 婚姻: 已婚 子女: 1 学历: 本科 学位: 硕士 职称: 副教授 工作单位: 烟台大学 联系电话: 13806381234 电子邮箱: wangdesong@yantaiu.edu.cn

MICHAEL ATZ and HARRY ATZ,
Doing Business under the Firm
Name and Style of ATZ BROS.,
Appellees,

vs.

FIDELITY & CASUALTY CO. OF
NEW YORK, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE KATCHETT
DELIVERED THE OPINION OF THE COURT.

The defendant has appealed from a judgment in the sum of \$10,675 entered in favor of the plaintiffs upon the verdict of a jury. The statement of claim is upon an indemnity and insurance policy issued by defendant to plaintiffs on December 14, 1924, whereby the defendant insured the plaintiffs, upon certain conditions named in the policy, from loss by robbery.

The policy was known as an "Outside Messenger Robbery and Interior Office Robbery" policy. Clause A provided for insurance during the hours beginning at seven o'clock a. m. and ending at seven p. m., "from a custodian while outside of the premises, unaccompanied or accompanied by one or more guards, as specified in Provision 21 ***." The general provisions of the policy state that robbery within the meaning of the same is limited to a felonious and forcible taking of property--

"(a) By violence inflicted upon the person or persons in the actual care and custody of the property at the time; or (b) By putting such person or persons in fear of violence; or (c) By an overt felonious act committed in the presence of such person or persons and of which they were actually cognizant at the time; or (d) From the person or direct care or custody of a custodian, who, while conveying property insured under this

policy, has been killed or rendered unconscious by injury inflicted maliciously or sustained accidentally."

The statement of claim alleged the delivery of the policy and the payment of the premium, and averred that on September 5, 1925, at about 12:30 o'clock in the afternoon, the plaintiffs suffered a loss by robbery outside of the premises and within the city of Chicago; that the robbers carried and took away property of the worth and market value of \$10,224.90, of which plaintiffs were the sole owners; that they gave prompt notice to the defendant in writing as required by the policy, and that the defendant was liable thereunder.

The defendant by its affidavit of merits denied that the robbery covered by the policy had occurred on the date set forth in plaintiffs' statement of claim; averred that plaintiffs did not furnish written proofs of loss within the provisions of the policy; denied that the property was in the actual care and custody of a custodian at the time; averred that the alleged robbery was not established by direct and affirmative evidence, and further that "the assured did not take all reasonable precautions to safeguard the property against loss by robbery."

The parties offered evidence in support of their respective contentions. At the close of all the evidence the defendant presented a motion for a directed verdict in its favor, which was denied. By stipulation of counsel the cause was argued in the jury room out of the presence of the court, objection being waived thereto, and at the conclusion of the argument the court instructed the jury as to the law.

The record shows the following stipulation:

"Let the record show, by agreement of counsel and with the approval of the Court, that the attorneys for both sides, if they take exceptions to any and all of the instructions given by the Court, can designate at a later date which particular instruc-

tions, if any, and if occasion should arise, they wish to take exceptions to. So that there may be no misunderstanding, counsel on both sides and the court agree that it will not be necessary at this time to point out particular objections to instructions by counsel for either side, but that the exceptions to the particular instructions, if they want to take exceptions to them, may be designated later on, on the appeal, if one is taken, to the Appellate Court. This is with the approval of the Court, and it is intended by the parties that it will not be necessary now or at the conclusion of the trial for counsel to designate to which instruction exception is taken, but that right is reserved to take any exception to instructions on appeal."

The record further shows that at the conclusion of the instructions the defendant took an exception to the giving of the instructions and each or either of them to the jury. One of the instructions given was as follows:

"The Court instructs the jury if you find from the evidence that unknown persons feloniously pried open the automobile and robbed the property of the plaintiffs so located, and while they were in the act of carrying away the property while the plaintiff was cognizant and saw the felonious act, and made efforts to prevent or overtake the felons, the defendant is liable to plaintiffs under said policy for said amount of loss sustained by the felonious taking of the plaintiff's property up to the amount and not exceeding \$10,000."

It is, of course, elementary that an instruction such as this directing a verdict must contain each and every element necessary to liability. One of the defenses set up in the affidavit of merits, which there was evidence tending to prove, was that the plaintiffs had not used reasonable precautions to prevent the taking of the goods. If they had not, then plaintiffs would not be entitled to recover. This defense, however, was wholly disregarded by this instruction, which directed a verdict. Plaintiffs cite Woolner Distilling Co. v. Peoria A. B. R. Co., 136 Ill. App. 479; Greenburg v. S. B. Childs & Co., 242 Ill. 110; Zeeman v. North American Union, 263 Ill. 304; Peckare v. Halberg, 246 Ill. 95; and Bernier v. I. C. R. Co., 296 Ill. 464, to the effect that where in the municipal court the jury is instructed orally, it is improper to separate the charge into paragraphs, and that an oral charge to the jury is to be construed as a whole. These decisions would, we think, be controlling were it not for the effect of the stipulation

into which plaintiffs entered waiving these provisions of the usual practice in such cases. The practice in this respect having been waived and another adopted, we are of the opinion that the giving of the quoted instruction and others which it is unnecessary to discuss at length, was ~~permissible~~ error which requires a reversal of the judgment.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Conner and McShurely, JJ., concur.

the first of these is the fact that the
 results of the tests are not in
 general in good agreement with the
 results of the tests of the other
 types of tests. The results of the
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 are in general in good agreement
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The results of the tests of the first type of tests

are in general in good agreement

with the results of the tests of the first type of tests.

The results of the tests of the first type of tests

MINNIE JACKSON,
Appellee,

vs.

R. C. HUNTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for the sum of \$1,000 claimed to be due to her from R. C. Hunter, George S. Campbell and Lincoln State Bank of Chicago under an agreement made and entered into about July 24, 1926. Her statement averred that that sum was deposited by the defendant Hunter with defendant Campbell, cashier of the Lincoln State Bank of Chicago, who refused to pay it to the plaintiff. She also averred that said sum was paid her for compensation for information given to the defendant Hunter, which information was for the financial benefit of Hunter, and that she, plaintiff, had complied with her part of the agreement, but defendant refused to pay although often requested.

A joint affidavit of merits was filed by defendants the suit was but afterwards dismissed as to Campbell and the bank. The cause was submitted to a jury upon evidence produced by the parties, and the jury returned a verdict finding the issues against the defendant and assessing plaintiff's damages at \$1,000, upon which the court, over-ruling defendant's motions for a new trial and in arrest, entered judgment.

The evidence tended to show that defendant Hunter had become surety for the appearance of one Parker, who had been indicted in the Criminal court of Cook county for a felony and who thereafter fled the jurisdiction, becoming a fugitive from justice. Parker had formerly lived or had a room at the home of the plain-

2481A.638

APPEAL FROM UNITED STATES COURT

OF CHICAGO

MR. JUSTICE JAMES M. HANCOCK

REVEREND THE CHURCH OF THE SOUTH

Plaintiff sued for the sum of \$1,000 claimed to be

due to her from R. C. Hunter, George H. Campbell and Lincoln

State Bank of Chicago under an agreement made and entered into

July 24, 1924. Her statement averred that said sum was

deposited by the defendant Hunter with defendant Campbell, trustee

of the Lincoln State Bank of Chicago, who refused to pay it to the

plaintiff. She also averred that said sum was paid her for compen-

sation for information given to the defendant Hunter, which infor-

mation was for the financial benefit of Hunter, and that she, plain-

tiff, had complied with her part of the agreement, but defendant

refused to pay although often requested.

A joint affidavit of veritas was filed by defendant

the suit was afterwards dismissed as to Campbell and the cause

was submitted to a jury upon evidence produced by the parties, and

the jury returned a verdict finding the issues against the defend-

ant and assessing plaintiff's damages at \$1,000, upon which the

court, overruling defendant's motion for a new trial and in

error, entered judgment.

The evidence tended to show that defendant Hunter had

become surety for the appearance of one Parker, who had been in-

dicted in the criminal court of Cook county for a felony and who

thereafter fled the jurisdiction, becoming a fugitive from justice.

Parker had formerly lived at a room at the home of the plain-

tiff, and plaintiff testified that she at all times had knowledge of his whereabouts. The bond having been forfeited, defendant opened negotiations with plaintiff with a view to obtaining the return of Parker to the jurisdiction. On May 6, 1926, plaintiff and defendant entered into a written contract whereby plaintiff agreed to enter defendant's service to persuade Parker to return to the jurisdiction, and plaintiff says that defendant gave her a check and paid her railroad fare to Mexico for the purpose of persuading Parker to return. She says she made the trip but Parker refused to come back; that defendant Hunter then asked her to tell him where Parker was, which she refused to do. However, the negotiations were continued and plaintiff says that she told the defendant she would not give him the information for \$500 but that he would have to pay \$1,000. July 24, 1926, defendant drew a check on the Lincoln State Bank for the sum of \$1,000, payable to the "order of R. C. Hunter and Minnie Jackson," and delivered the same to Campbell, and the plaintiff says she then promised defendant she would tell where to find Parker. She says that there was no agreement in writing made at that time and that she told defendant that "Parker could be found at the Pullman Porters' office in Oakland, California. I did not give him any street address. Neither Hunter nor Campbell wrote down the address. Hunter afterwards 'phoned from the State's Attorney's office asking for the correct address. This was after the transaction at the bank. I told where to go in Oakland to find Parker; that was over the telephone after the transaction at the bank."

About August 15, 1926, Parker, who had been arrested in Oakland, California, was brought back to Chicago by Police Sergeant Frank Starke, who says that he went there after

... and plaintiff testified that she at all times had knowledge of his whereabouts. The bond having been forfeited, defendant opened negotiations with plaintiff with a view to obtaining the return of Barker to the jurisdiction. On May 6, 1936, plaintiff and defendant entered into a written contract whereby plaintiff agreed to enter defendant's service as personal secretary to return to the jurisdiction, and plaintiff agreed that defendant gave her a check and paid her railroad fare to Mexico for the purpose of accompanying Barker to return. She says she made the trip but Barker returned to come back; that defendant Barker then asked her to tell him where Barker was, which she refused to do. However, the negotiator who was contacted and plaintiff says that she told the defendant she would give him the information for \$500 but that he would have to pay \$1,000. July 24, 1936, defendant gave a check on the First State Bank for the sum of \$1,000, payable to the "order of E. C. Hunter and Minnie Jackson," and delivered the same to plaintiff, and the plaintiff says she then produced defendant to the world tell where to find Barker. She says that there was no agreement in writing made at that time and that she told defendant that "Barker could be found at the William Foxberg's office in Oakland, California. I did not give him my street address. William Hunter met (Barker) I wrote down the address. Hunter afterwards obtained from the State's Attorney's office asking for the correct address. This was after the transaction at the bank. I said where to - in Oakland to find Barker; that was over the telephone after the transaction at the bank." Defendant, about August 18, 1936, Barker, who had been arrested in Oakland, California, was brought back to Chicago by Willis Bergman, known as "Berg", he says that he went there after

sending telegrams through the police department for the arrest of Parker and after offering a reward to the California police, which reward the defendant testified he paid to them. The plaintiff says that the check was written out entirely by Campbell and that Campbell signed Hunter's name to it; that there was no other writing made at that time. The defendant says, on the contrary, that the check was in his own handwriting as was the writing on the back of it, which was as follows:

"Deliver to Minnie Jackson when Wm. H. Parker is in the custody of Chicago Police."

The defendant further testified that a written statement was signed, and this written statement and the check were left with Mr. Campbell at the Lincoln State bank. This written statement is in evidence but is not signed by the plaintiff. In substance it directs that the check shall be turned over to the plaintiff if she induces Parker to return to Chicago and surrender to the police authorities within three weeks from that date, or if she furnishes information whereby Hunter apprehends ^{him} Barker and returns to Chicago as a fugitive from justice. The defendant testified positively that plaintiff never gave him any information whereby he apprehended Parker. He says:

"Mrs. Jackson never did tell me where Parker was. She said he was in Southern California. Parker was actually captured in Oakland, California, near San Francisco. I never called up Mrs. Jackson from the State's Attorney's office so as to have a witness hear what she said. Sergeant Starke brought Parker back from California. I gave him over four hundred dollars to bring Parker back and also a reward for the Chief of Police of Oakland, California."

It is apparent from this recital that the case for the plaintiff rests upon her own testimony, which is positively denied by defendant. The parties are equally interested in the result of the suit, and the acknowledged manner in which the plaintiff conducted herself with reference to the transaction in Mexico does not tend to induce a belief in her credibility. She admits that she at all times knew where Parker was;

...with the police department for the arrest
of Barker and after offering a reward to the California police,
...the defendant testified he paid to them. The
plaintiff says that the check was written out entirely by
Campbell and that Campbell signed Hunter's name to it; that there
was no other writing made at that time. The defendant says, on
the contrary, that the check was in his own handwriting as was
the writing on the back of it, which was as follows:
"Payable to Minnie Jackson when Mr. B. Barker is in the
custody of Chicago Police."
The defendant further testified that a witness state-
ment was signed, and this written statement and the check were
left with Mr. Campbell at the Lincoln State Bank. This written
statement is in evidence but is not signed by the plaintiff.
In substance it shows that the check shall be turned over to the
plaintiff if the unknown Barker is taken to Chicago and re-
turned to the police authorities within three weeks from that
date, or if the defendant furnishes the necessary funds to
return and return to Chicago as a fugitive from justice. The
defendant testified positively that plaintiff never gave him any
information as to the whereabouts of Barker.

...the plaintiff's name upon her own testimony, which is posi-
tively denied by defendant. The parties are equally interested
in the result of the suit, and the acknowledged manner in which
the plaintiff conducted herself with reference to the transac-
tion in Mexico does not tend to induce a belief in her credi-

nevertheless, although she had made a trip at defendant's expense, she told him that she did not know where Parker was; she also told defendant that Parker was in Mexico when she knew he was in California. On the other hand, while the defendant produces an alleged writing deposited with the check, under the terms of which the evidence would be wholly insufficient to justify a recovery, Campbell, the custodian of the check and the supposed custodian of the statement put in escrow with the check, was not called as a witness.

The error upon which defendant relies is that the case being close upon the evidence, the Judge erred in directing the attention of the jury to a supposed contradiction in the testimony of the defendant, in reading pleadings to the jury and in remarks made with reference to the testimony of the plaintiff, which it is claimed had a prejudicial effect upon the jury. Upon cross-examination plaintiff testified, as we have already recited, with reference to her knowledge that Parker was in California, while she told defendant he was in Mexico -

"Had gotten letters from him there for a year. I never told anyone where Parker was.

Mr. Markowitz: Did you understand the question?

Mr. Wilson: It is plain enough.

Mr. Markowitz: Be careful.

Mr. Wilson: You didn't tell him?

A. Not before the check was made out.

Mr. Markowitz: I don't want you to confuse the witness.

Mr. Wilson: It is a plain question.

The Court: The jury has heard what her testimony was.

She didn't tell the exact spot; told the office where he worked then, Seventh and Pine, Oakland, California. She told Hunter this---

Mr. Wilson: I object to the court stating what the evidence is. I take an exception."

Again, in the cross-examination of defendant, the following occurred:

"Q. You made this thousand dollar check and then forgot about it?

A. I gave it to the Cashier of the Lincoln Bank.

Q. And then forgot all about it?

A. I didn't forget about it.

Q. She came back from California three weeks---

A. It was eight weeks; she was not three weeks from Mexico or California.

Q. Three weeks or a month; you didn't think she knew the address in Oakland, California.

Mr. Wilson: That is objected to.

The Witness: She told me she didn't know.

The Court: He said three weeks, then eight weeks---

Objection by defendant to Court's remarks."

Again, the court instructed the jury orally, and in the course of his instruction stated:

"The affidavit of defense which has been filed here on behalf of the defendant, Hunter, admits the contract but denies that the plaintiff complied with her agreement contained in the contract and therefore denies that the defendant, Hunter, is indebted to the plaintiff in that sum or one thousand dollars, and that is the issue in this case," etc.

Upon inquiry by the court as to whether there was any objection to the instructions as to form, the record discloses the following:

"Mr. Wilson: There is one objection I have, that the statement of claim admitted the contract, I think that is---

The Court: The affidavit of merits. I will read it to you. The defendant, Hunter, is not indebted to the plaintiff for the sum of one thousand dollars; the plaintiff did not give the said Hunter information for his benefit; said plaintiff didn't comply with her part of the agreement as alleged in her statement of claim.

Mr. Markowitz: That is the first statement, that he isn't at all indebted.

Mr. Wilson: What the court has read is only a part of the affidavit of merits. It shows he denies the contract.

The Court: He admitted the contract on the witness stand; he identified the contract.

Mr. Wilson: I object to the court's statement. All right; I just want to make the record.

The Court: Let the record show that counsel objects to the Court's instruction that the contract offered -- it is offered by the defendants?

Mr. Markowitz: By the defendants.

The Court: Is the contract of the parties.

Mr. Markowitz: They offered it, we didn't.

The Court: The Court states or reiterates the contract has been offered here by counsel for the defendants, identified by defendants as their contract and the Court interpreted the affidavit of merits to mean that there was no denial of the contract--you catch what the Court means."

We think that the statements of the court, in the first instance reciting to the jury evidence of the plaintiff upon the crucial issues in the case, and in the second instance calling the attention of the jury to an apparent contradiction in the evidence of the defendant, while no doubt inadvertently

...three weeks or a month; yet they think and know the ...
...The witness: She said she didn't know.
...The Court: He said three weeks, then eight weeks--
...objection by defendant to Court's remarks.

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...contract and therefore denies that the defendant, Hunter, is
...indebted to the plaintiff in that sum or one thousand dollars,
...and that is the issue in this case," etc.

Upon inquiry by the court as to why there was any
...to the instructions as to form, the record discloses

...Mr. Wilson: There is one objection I have, that the
...statement of witness admitted the contract, I think that I --
...The Court: The attorney of defense, I will read it to
...The witness, Hunter, is not indebted to the plaintiff
...for the sum of one thousand dollars; the plaintiff did not
...give the said Hunter instruction for his benefit; said plain-
...tiff didn't comply with her part of the agreement as alleged
...in her statement of claim.

Mr. Hunter: That is the first statement, that he
...isn't at all indebted.

Mr. Wilson: That the court has read in only a part of
...the plaintiff's benefit. It shows he denies the contract;
...The Court: He admitted the contract on the witness stand;
...he admitted the contract.

Mr. Wilson: I object to the court's statement. All right;
I just want to make the record.
The Court: Let the record show that counsel objects to
...the court's instruction that the contract is void -- it is ob-

...by the defendant.
The Court: Is the contract of the parties.
Mr. Hunter: That's offered it, we didn't.
The Court: The Court states or reiterates the contract has
...been offered here by counsel for the defendant, identified by
...defendants as their contract and the Court instructed the jury
...basis of merits to mean that there was no denial of the contract.
You can't have the Court's name.

We think that the statements of the court, in the

first instance resulting to the jury evidence of the plaintiff
upon the crucial issues in the case, and in the second instance
called the attention of the jury to an apparent contradiction
in the evidence of the defendant, while no doubt inadvertently

made, could not have failed to be prejudicial to the defendant upon a case so close upon the facts. Herritt v. Bush, 122 Ill. App. 189; Fish v. Ryan, 38 Ill. App. 524.

We think too that the remarks of the court to the jury in the discussion of the affidavit of merits were prejudicial and had a tendency to confuse the jury. The contract which the evidence for plaintiff tended to establish, was not admitted by the affidavit of merits and was not an undisputed matter of fact in the case. On the contrary, the evidence of the defendant with reference to the contract tended materially to contradict the evidence of the plaintiff as to what the contract was. In a close case and in the presence of a jury, a trial court should be exceedingly careful that by no word or act may the jury infer that the court favors either ^{one} side or the other on an issue of fact.

For the reasons which we have indicated, the judgment is reversed and the cause remanded.

REVEREND AND RESPECTED.

O'Connor and McBurney, JJ., concur.

made, could not have failed to be prejudicial to the defendant
upon a case so close upon the facts. Marshall v. Marshall, 122 Ill.
App. 102, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

We think too that the manner of the court to the

jury in the discussion of the affidavits of merits were prejudicial-
also and had a tendency to confuse the jury. The contract which
the evidence for plaintiff tended to establish, was not admitted
by the affidavit of merits and was not an undoubted matter of
fact in the case. On the contrary, the evidence of the defendant
and with reference to the contract tended materially to contradict
the evidence of the plaintiff as to what the contract was. In a
case such as in the presence of a jury, a trial court should be
especially careful that by no word or act may the jury infer
that the court favors either side or the other on an issue of fact.
For the reasons which we have indicated, the judgment

is reversed and the case remanded.

REVEREND AND HONORABLE,

Very respectfully,
J. H. HARRIS, JR.

FRED B. SMITH FURNITURE CO.,
a Corporation,

Appellee,

vs.

ABE STERNBERG,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and in its statement of claim alleged that on February 20, 1924, it was lawfully entitled to possession, as of its own property, of twelve bedroom sets, each set consisting of four pieces, which twelve sets the plaintiff purchased from the defendant, paying therefor to the defendant on that date \$1,200; that defendant agreed to hold these sets until plaintiff should demand them; that the plaintiff repeatedly demanded the sets but received only eight thereof, and that the defendant, well knowing that the remaining bedroom sets were the property of the plaintiff, had not delivered them or any part thereof to the plaintiff but refused to do so; that on May 18, 1924, defendant converted and disposed of the said goods and chattels to his own use. Plaintiff claimed damages in the sum of \$400.

The defendant appeared and demanded trial by jury.

He filed an affidavit of merits in which he denied -

"that he did, on to-wit, the 18th day of May, 1924, or at any other time, convert or dispose of any goods, wares or chattels belonging to the plaintiff, or which were the property of the plaintiff, and

Defendant denies that on February 20, 1924, or at any other time, the plaintiff was entitled to the possession of twelve or any other number of bedroom sets that were in possession or control of the defendant.

Defendant further denies that he, at any time, had possession or control of any specific property belonging to the plaintiff, which the defendant converted or disposed of to his own use."

248 I.A. 834

APPEAR FROM MUNICIPAL COURT
ON CHICAGO

REED D. ... IN ... CO.,
a corporation

... AND ...
Appellant

MR. JUSTICE ...
DELIVERED THE OPINION OF THE COURT.

... brought suit and in its complaint of claim
... on February 20, 1934, it was ...
... of its own property, of twelve bedroom ...
... of four places, which twelve ...
... from the defendant, paying therefor to the defendant ...
... that date \$1,000; that defendant agreed to hold these ...
... that the plaintiff should ...
... the rate but received only eight thereof, and that the
... well knowing that the remaining bedroom ...
... the plaintiff, had not ...
... to the plaintiff but refused to do so; that on May 1,
1934, defendant converted and disposed of the said goods and
... to his own use. Plaintiff claims damages in the sum
of \$400.

The defendant appeared and demanded trial by jury.
He filed an answer in which he denied -
"that he did, on or about, the 15th day of May, 1934, or at any
other time, convert or dispose of any goods, wares or chattels
belonging to the plaintiff, or which were the property of the
plaintiff, and
that defendant denies that on February 20, 1934, or at any
other time, the plaintiff was entitled to the possession of
twelve or any other number of bedroom sets that were in
possession or control of the defendant, ...
Defendant further denies that he, at any time, had posses-
sion or control of any specific property belonging to the
plaintiff, which the defendant converted or disposed of to his
own use."

The cause was tried by jury, the plaintiff offered evidence tending to sustain his contentions, and at the close of all the evidence the court directed the jury to return a verdict for the plaintiff and assessed plaintiff's damages at \$400. Motions for a new trial and in arrest of judgment were over-ruled and a judgment for that amount was entered.

Rule 12 of this court in part provides that the brief of points of any party must be followed by an argument in support of the same; that the argument shall be confined to discussion of the same points contained in the brief and none other, and that the points shall be argued in the order in which they are made in the brief; that a point made but not argued may be considered as waived. Applying this rule to the brief presented by appellant, an examination of his argument discloses that it is confined to a single point and that point directed to the contention that the conduct of the trial court was such as to preclude a fair and impartial trial before the jury. The argument states:

"We respectfully submit that the record and abstract conclusively show that the defendant was denied the opportunity to present its defense to the jury. We respectfully submit that the fundamentals of trial by jury were grossly violated by the trial judge. We recognize that in this brief and argument we have not cited at any great length authorities and decisions to support our contentions that certain evidence was improperly admitted, certain evidence was improperly excluded, and to sustain other detailed objections, which we otherwise would have done.

In this case however we have not deemed it necessary so to do because the record as a whole shows a total failure on the part of the trial judge to permit the defendant to have his day in court, which we feel to be the paramount issue in this case."

In view of this complaint we have carefully examined the abstract of the record. While by no means ready to give our approval to the manner in which the trial was conducted by the court, our examination does not disclose an endeavor to present a meritorious defense.

The evidence given by plaintiff in support of his suit

shows without contradiction the payment of \$1200 by plaintiff to the defendant for the twelve bedroom sets as alleged, and the failure of the defendant to deliver four sets. If there was any evidence offered or received tending to disprove the case made by plaintiff, it has not been pointed out.

Courts of review do not sit merely for the purpose of criticizing the conduct of trial judges where substantial justice has been attained. Finch v. Wisconsin Dairy Farm Co., 167 Ill. App. 400; Empire State Surety Co. v. Schillinger Bros., 167 Ill. App. 632; Inter Ocean Cabinet Co. v. McLaughlin, 169 Ill. App. 559; Brooks v. Vinegar Bend Lumber Co., 182 Ill. App. 145, and Barton Tie Co. v. Jackson, 206 Ill. App. 393, affirmed in 281 Ill. 452.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

MATILDA EAGLESTON,
Appellee,

vs.

WILLIAM BOTTINGER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from an order denying his motion to set aside a judgment theretofore entered by confession upon the covenants of a written lease.

The plaintiff has not appeared in this court to support the judgment entered, and we have decided the cause without the benefit of any suggestions in her behalf either as to facts or the law.

The written lease, upon which judgment by confession was entered, is dated March 18, 1927, and it purports to grant to the defendant a term commencing May 1, 1927, and ending April 30, 1928. The affidavit in support of the motion to vacate states that on the date of the purported lease duplicate leases were forwarded to defendant by plaintiff's agent and were signed by defendant and returned to the agent; that defendant's wife, who was in ill health, was later advised by her physician that the premises were unsuitable; that she explained the situation to the plaintiff, who told her that she, plaintiff, would endeavor to rent the apartment to another at once; that plaintiff afterwards took the position that she would hold defendant for the rent for the month of May, and that thereafter defendant forwarded to plaintiff a check for \$20 on account of the May rent and informed

plaintiff that he would take the apartment. Plaintiff, however, returned the receipt made out as for a deposit on the flat and as a matter of fact never delivered the lease to the defendant.

The lease, which is in the record (having been filed at the time judgment was entered thereon) purports to be executed by only one of the parties. This would, of course, be immaterial in case the lease had actually been delivered by the parties and acted upon by them. An intention of the parties to deliver and be bound is necessary to the creation and validity of any written contract. It was error for the court to enter judgment upon a lease which had never in fact been delivered, accepted or acted upon by the parties. See on Landlord and Tenant, Sec. 220, p. 331; Field v. Brown, 90 Ill. App. 195; Globe Brewing Co. v. Simon, 132 Ill. App. 198; McGivern v. Parkhill, 195 Ill. App. 343; Gullies v. Peter Schoenhofen Brewing Co., 201 Ill. App. 472.

In the absence of appearance or proof by the plaintiff, we shall forbear further discussion. For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McCursy, JJ., concur.

plaintiff had he would take the apartment. Plaintiff, however, advised the trustee made out as for a deposit on the 1st and as a matter of fact never delivered the lease to the defendant.

The lease, which is in the record (having been filed at the time judgment was entered thereon) purports to be executed by only one of the parties. This would, of course, be immaterial in case the lease had actually been delivered by the parties and acted upon by them. An inspection of the parties to deliver and be bound is necessary to the creation and validity of any written contract. It was error for the court to enter judgment upon a lease which had never in fact been delivered, accepted or acted upon by the parties. Wood on Landlord and Tenant, Sec. 220, p. 221; Little v. Brown, 60 Ill. Rep. 128; 12 Ill. App. 128.

It is the absence of appearance or proof by the plaintiff, we shall further discuss. For the reasons discussed the judgment is reversed and the cause remanded. The defendant is to pay the costs of the appeal.

Reversed and remanded, 31, error.

LOUIS G. MERRITT and HERBERT
M. MERRITT, Copartners, Doing
Business as MERRITT ENGINEERING
& SALES COMPANY,

Appellees,

vs.

JOSEPH A. ROSENFELD, Doing Business
as ROSENFELD MACHINERY COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE KATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff co-partners sued in assumpsit for damages for failure to deliver a second-hand machine known as a "Merritt Veneer Redrier," as agreed.

The defendant pleaded the general issue and specially a custom. There was a trial by jury and a verdict for plaintiffs in the sum of \$1,200, upon which judgment was entered. The errors assigned and argued go to the question of damages.

The evidence tended to show that the plaintiff co-partners in May, 1924, were engaged in business at Lockport, New York; that they acted as the sales organization for the Merritt Manufacturing Company, which manufactured these Merritt Veneer Redriers.

The defendant was a dealer in new and second-hand machinery at 23 North Kedzie Avenue, Chicago.

On May 15 or 16, 1924, at an auction sale held at Milford, Michigan, the defendant purchased the machine in question for \$200 and a few days thereafter by correspondence sold it to plaintiffs for \$750, delivery to be made at Milford, Michigan. The machine had been in use for about five and a half years at that time, and the evidence tends to show that it was in first-class condition. There was also evidence from which the jury might have

2000 220510 10000 10000

in the sum of \$1,000, upon which judgment was entered.

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found that the machine in the condition in which it was at that time was nearly as good as a new machine. The machine was patented and the price of new machines was practically in the control of the manufacturer. New machines of the kind and character of the one here in controversy were selling at \$6600 to \$6700.

The defendant did not deliver the machine to plaintiffs as agreed, but sold it to William Morris & Company of Chicago, who paid therefor \$1200 and freight from Milford to Chicago, amounting to the further sum of \$94.97.

There was evidence from which the jury might have found that repairs had been made upon the machine before its sale to Morris & Company, as one witness testified, to the amount of \$40, and another witness to between \$110 and \$140.

The rules of law applicable to damages in a case such as this are stated in section 67 of the Uniform Sales act, Ill. Rev. Stat., chap. 121A. That statute provides in substance that the measure of the damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract; that where there is an available market the measure of damages in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time delivery should have been made. The courts of this and other states have held in substance that where there is no market price at the place of delivery, then the market price at the nearest place where there is such market, can be shown, and the difference between that price and the contract price plus the cost of transportation, is the measure of defendant's damages. Solomon v. Richardson, 207 Mich. 415; Copen v. DeSteiger Glass Co., 105 Ill. 189; North Shore Lumber Co. v. South Side Lumber Co., 175 Ill.App. 96.

found that the machine in the condition in which it was at that time was nearly as good as a new machine. The machine was patented and the price of new machines was practically in the control of the manufacturer. New machines of the kind and character of the one here in controversy were selling at \$4500 to \$5000.

The defendant did not deliver the machine to plaintiff as agreed, but sold it to William Morris & Company of Chicago, who paid therefor \$2800 and freight from Milford to Chicago, amounting to the further sum of \$24.97.

There was evidence from which the jury might have found that repairs had been made upon the machine before its sale to Morris & Company, an oral witness testified to the amount of \$40, and another witness to between \$10 and \$140.

The rules of law applicable to damages in a case such as this are stated in section 67 of the Uniform Sales Act, III. Rev. Stat., chap. 131A. That statute provides in substance that the measure of the damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract; that where there is an available market the measure of damages in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the contract price and the market or current price of the goods at the time delivery should have been made. The courts of this and other states have held in substance that where there is no market price at the place of delivery, then the market price at the nearest place where there is such market, can be shown, and the difference between that price and the contract price plus the cost of transportation, is the measure of defendant's damages. Boleson v. ...

Boleson v. ... 111 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The appellant contends that there was no proof of a market value of any kind and especially no proof of the same at time and place of delivery. He says that while the owner of a patented machine may make his own price and compel payment of the same from the purchaser who demands the article, he cannot fix that price as a measure of damages in a case where he is the plaintiff. We think it is hardly necessary to discuss that question on this record. While plaintiffs may have had it within their power to fix the price at which new machines would be sold, obviously they did not have such power with reference to second-hand machines, and this was a second-hand machine. It is true, as defendant contends and as was held in Farson v. Buder, 187 Ill. Ill. App. 313, that a forced sale in bankruptcy is not a fair criterion of the market value.

The record, however, is not destitute of evidence tending to show what that value was, since it discloses, in addition to the sale in bankruptcy, two other sales of ^{the} machine, one for \$750 and the other for \$1200 plus freight charges to Chicago. If we assume that the jury found that \$40 had been expended for necessary repairs, we think the jury would have been justified in finding that the machine at the time and place in question was of the value of \$1160, which would indicate (since plaintiffs' check for the purchase price was not accepted) damages at least to the sum of \$410. Not only do we think the jury would have been justified in so finding, but a verdict for any less amount than this on the record could not be permitted to stand.

There is opinion evidence given by experts tending to show that the machine was of a value of \$4800. This was a twelve-plate machine. One of the experts testified to the sale at Milwaukee of a second-hand four-plate machine of the same kind for \$3200. There is no evidence, however, as to the cost and expenses

...the value of the machine at the time of delivery. It was that while the owner of a
valuable machine... make his own price and accept payment of the
same from the purchaser who demands the article, he cannot take
that price as a measure of damages in a case where he is the
plaintiff. We think it is hardly necessary to discuss that
question on this record. The plaintiff may have had it within
their power to fix the price at which new machines would be sold,
obviously they did not have such an ex with variance to second-
hand machines, and this was a second-hand machine. It is true, as
defendant contends and as was held in Wright v. Hughes, 107 Ill.
111, 400, that a forced sale in bankruptcy is not a fair
reflection of the market value.
The record, however, is not deficient of evidence
tending to show that that value was, since its disclosure, in this
case to the sale in bankruptcy, two other sales of machines, one
for \$750 and the other for \$1200 plus freight charges to Chicago.
It we assume that the jury found that \$40 had been expended for
necessary repairs, we think the jury would have been justified in
finding that the machine at the time and place in question was of
the value of \$1160, which would indicate (since plaintiff's check
for the purchase price was not accepted) damages at least to that
sum of \$110. Not only do we think the jury would have been justified
in so finding, but a verdict for any less amount than this on
the record could not be sustained as against the defendant.
There is further evidence given by expert testimony to
show that the machine was of a value of \$1200. This was a twelve-
plate machine. One of the experts testified to the value of \$1100
value of a second-hand four-plate machine of the same kind for
\$2000. There is no dispute, however, as to the cost and expenses

of making this sale. The machine was a patented article for which plaintiffs had the exclusive rights of sale. There is no evidence as to the cost of manufacture nor cost of putting on the market. The opinions of the experts were purely speculative.

Defendant offered evidence tending to show the existence of a custom by which the offer of sale or sales of any second-hand machines was always made subject to a prior sale. The evidence fails, however, to establish a universal custom, and moreover the existence of such a custom was denied; and the finding of the jury we think concludes defendant on this point.

On the evidence plaintiffs are entitled to recover \$410, and if they will remit \$790 within ten days, the judgment will be affirmed, otherwise reversed and remanded.

**AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.**

O'Connor and McSweeney, JJ., concur.

of seeing this sale. The machine was a patented article for which
plaintiff had the exclusive right of sale. There is no evidence
as to the cost of manufacturing or cost of selling of the machine.

The opinion of the experts was purely speculative.
Defendant offered evidence tending to show the ex-

istence of a custom by which the offer of sale of any
standard machine was limited to a single sale.

The evidence fails, however, to establish a universal custom, and
therefore the defendant is held to a single sale.

of the fact to which defendant's evidence was held.
The evidence plaintiff was entitled to recover

and it was held that the evidence was sufficient
to establish defendant's liability.

ATTORNEY GENERAL
SHERMAN AND HENRY

Sherman and Henry, 111, Broadway.

NEW YORK

DECEMBER 10, 1901

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT

AND THE HONORABLE JUSTICES OF THE COURT

IN CHIEF

NEW YORK

THE SUPREME COURT

THOS MOULDING BRICK CO.,
Defendant in Error,

vs.

JENNIE TAYLOR, JOHN M. TAYLOR
and A. HAMILTON,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MCGURNLY DELIVERED THE OPINION OF THE COURT.

By this writ of error John M. Taylor, defendant, seeks the reversal of a decree giving complainant a subcontractor's lien on the interest of John M. Taylor in certain real estate in Chicago. The lien was for building material. The abstract of the decree does not inform us as to the amount. The master's report recommended the entry of a decree for \$3389.50 with interest.

The complainant asks that the abstract and brief of the defendant be stricken for failure to conform to rules 18 and 19 of this court and that the decree be affirmed pro forma.

Matot v. Barnheisel, 212 Ill. App. 439. There is justification for this action.

The record fails to show any objections or exceptions to the master's report; therefore the findings by the master as to facts cannot be questioned in this court. Mathews v. Whitcomb, 220 Ill. 36. The master found that on or about July 7, 1925, John M. Taylor, one of the defendants, and Linnie Taylor, his wife, were the owners as joint tenants of certain real estate in Cook County and had made a contract with A. Hamilton, as general contractor, to erect an improvement thereon. Hamilton entered into an agreement with the complainant to furnish brick and building materials, which were furnished. Hamilton defaulted in the work and at the time of such default there was the sum of \$1600 payable to subcontractors for completing the work. The

1.00 EXHIBIT DIVISION 1.00
1.00 EXHIBIT DIVISION 1.00

defendants subsequently paid out the entire contract price but did not request or receive from Hamilton a statement or affidavit as to subcontractors.

Complainant was unable to locate said defendant John M. Taylor or Jennie Taylor. The evidence shows that on inquiry complainant's agent was informed that a John M. Taylor lived at 4351 Federal street and an attempt was made to serve him there. Defendant claims that the record shows that the John M. Taylor who lived on Federal street, and who is not the defendant, was served with the statutory notice of mechanic's lien, and his entire argument is predicated upon the assumption that this service being on the wrong John M. Taylor, the subsequent notice filed with the clerk of the Circuit court, pursuant to section 25 of the Mechanic's Lien act, was invalid. The evidence does not show that anyone was served with notice at 4351 Federal street. The witness testified that he inquired there for a John M. Taylor and his wife and was informed that the parties had moved some time before to an unknown address. The same witness went to the premises in question, 9403-9405 South Wabash avenue, but found them unoccupied, and thereupon the notice provided by section 25 was filed with the clerk of the Circuit court, and the master found accordingly. Even if there had been actual service on the wrong John M. Taylor, the complainant would not be estopped thereby from filing a subsequent notice with the clerk as soon as it was ascertained that the personal service was on the wrong party.

The complainant's bill described the wife of the defendant as Jennie Taylor instead of Linnie Taylor. John M. Taylor and Linnie Taylor filed their joint and several answers. The notice filed with the clerk of the Circuit court gave the name as Jennie Taylor instead of Linnie Taylor, and the master found that

defendant's representative said that the contract was not his
own contract or contract of the defendant or otherwise as
to the contract.

Complainant was unable to locate said defendant John
M. Taylor or James Taylor. The witness knows that an inquiry
complaint's agent was informed that a John M. Taylor lived at
1231 Webster street and an attempt was made to serve him there.
Defendant claims that the record shows that the John M. Taylor
who lived on Webster street, and who is not the defendant, was
served with the necessary notice of complaint's lien, and his en-
tire amount is paid when the complaint that this service
was on the wrong John M. Taylor, the subsequent notice filed
with the clerk of the Circuit court, pursuant to section 25 of
the complaint's lien was invalid. The witness does not show
that anyone was served with notice at 1231 Webster street. The
witness testified that he inquired there for a John M. Taylor and
his wife and was informed that the parties had moved some time
before the complaint's address. The same witness went to the premi-
um in question, 8803-8408 South Webster Avenue, but found them
unoccupied, and thereupon the notice provided by section 25 was
filed with the clerk of the Circuit court, and the matter found
accordingly. Even if there had been actual service on the wrong
John M. Taylor, the complaint would not be answered thereby
from filing a subsequent notice with the clerk as soon as it was
ascertained that the personal service was on the wrong party.
The complaint's bill described the wife of the de-
fendant as Linnie Taylor instead of Linnie Taylor, John M. Taylor
and Linnie Taylor filed their joint and several answers. The
notice filed with the clerk of the Circuit court gave the name as
Linnie Taylor instead of Linnie Taylor, and the matter found that

the complainant had a lien against the interest of John M. Tayler only and recommended that the bill be dismissed as to Linnie Tayler. The decree followed this recommendation. Where property is owned jointly by husband and wife, the interest of either may be subjected to a lien. Liam v. Hentze, 240 Ill. App. 273, 326 Ill. 633; Lawler v. Byrne, 252 Ill. 194.

The decree was proper and is affirmed.

AFFIRMED.

Ketchett, F. J., and O'Connor, J., concur.

DARWIN B. WINTERBURN,
Appellee,

vs.

GEORGE L. SCHRIFF,
Appellant.

APPEAL FROM SUPERIOR COURT
OF CHICAGO.

MR. JUSTICE McGRATH DELIVERED THE OPINION OF THE COURT.

Plaintiff in a suit to recover on three promissory notes executed by defendant to the order of plaintiff had a verdict for \$974. From the judgment thereon defendant appeals.

This is a controversy between attorneys. Defendant for a time subleased office space from plaintiff, and the notes in question were given in settlement of unpaid rent.

The defense is that the notes were given with the understanding that defendant would turn over to plaintiff certain prospective law suits, and the fees realized by plaintiff therefrom would be applied on account of defendant's notes; that defendant had sent plaintiff a case known as *DeFosse v. West Hammond*; that at the termination of the litigation plaintiff received for his fee \$1250; that defendant's share of this fee was \$500, which he received, and that he was also entitled, under the agreement, to have plaintiff apply the balance of \$750 on account of defendant's notes; hence he says the verdict is too large by \$750.

Plaintiff testified that this \$500 was to be credited on defendant's notes, that defendant asked him not to do this but to give him a check for the same, as defendant was short of funds, and that plaintiff, to accommodate defendant, gave him a check for this amount instead of applying it on the notes, and retained \$750 as his share of the fees in accordance with the agreement.

It is hardly probable that plaintiff would agree that the entire fee for his services should be turned over to defendant, in cash or as a credit on defendant's notes. This would mean that plaintiff did all the work and defendant received the entire compensation. Such an arrangement would be unconscionable. Furthermore, defendant testified that he did not expect plaintiff to do the work in the case and give him (defendant) credit for the whole fee. The defense asserted is not supported by the record.

It is claimed that the court erred in refusing to give the jury an instruction in accordance with the theory of the defense. This refused instruction was to the effect that, if the jury believed that plaintiff had an agreement with defendant to apply certain amounts received as fees upon the notes in suit and that these amounts were received and should have been applied, that defendant was entitled to have such amounts applied in payment of the notes. The substance of this instruction was covered by other instructions. Where two instructions are presented covering the same subject and presenting the same theory of the case, the court is not required to give them both, even if they be in different language and one be more elaborate than the other. Bingham v. Spruill, 97 Ill. App. 374; Reamer v. Reamer, 256 Ill. 312.

The judgment is sustained by the evidence and is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

1994:114

[Faint, illegible text]

J. ROTHSTEIN,
Appellee,
vs.
A. BAKEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit as a real estate broker for commissions on rents collected, upon trial had a verdict for \$659.39. Judgment was entered thereon and defendant appeals.

Plaintiff does not appear in this court to defend his judgment.

As there must be another trial, we will refer only briefly to the evidence. Plaintiff is a licensed real estate broker in Chicago, while defendant is in the dry-goods business, owning certain store property at 201-217 East 51st street, Chicago. Prior to August, 1924, Harry Jacobs & Company had been the renting agents for defendant, who was dissatisfied with their slowness in remitting rents collected. Plaintiff was associated with Jacobs & Company and repeatedly requested defendant to allow him to act as agent for the property. September 1, 1924, an arrangement was made whereby, according to the undisputed evidence of the defendant, plaintiff agreed to keep the building rented and collect the rents and make all leases, for a commission of 2½% of the rents collected. Plaintiff acted as defendant's agent up to September 1, 1925, when he was discharged; during this time he accounted to defendant each month and deducted his commission of 2½%. During this time he negotiated four leases for periods running beyond September 1, 1925, and this suit is for commissions on the rental accruing after his discharge.

1. *Journal of Management Studies*, 1997, 34, 1, 1-15.

As the evidence is clear that plaintiff agreed to accept for his compensation 2½% on the rents collected, which he did receive, the jury was not justified in finding that he was entitled to anything more.

The evidence tends to show a lack of good faith on plaintiff's part in his dealings with the defendant. Without defendant's authority, plaintiff took out \$10,000 fire insurance on defendant's property and delivered the policies to an attorney representing the holder of a second mortgage, plaintiff representing to the defendant that this attorney had demanded such insurance. Upon such representation defendant paid the bill for the same. The fact was that defendant had already fully insured the place, and the attorney testified that he made no request for additional insurance. It is obvious that plaintiff misrepresented the facts solely for the purpose of gaining a commission on the insurance.

There is evidence that plaintiff received and retained \$98 for consenting to the transfer of a lease without the knowledge or consent of the defendant.

It also appears that plaintiff gave defendant certain checks purporting to be for the rent collected, which were returned by the bank marked "not sufficient funds." August 25, 1925, plaintiff gave defendant his check on the Kenwood National bank for \$1009.20, which check was deposited and returned because plaintiff did not have sufficient funds in the bank. The same thing happened again August 29th. When this last check was returned "n.s.f." the defendant notified the plaintiff not to collect any rents after September 1.

An agent may be discharged for being unfaithful to his principal and in such event he forfeits his right to compensation. 2 Corpus Juris, pp. 536, 760, 764; Sidway v. American Mortgage

Co., 222 Ill. 270, 275. There being evidence tending to show the unfaithfulness of plaintiff toward defendant, the jury should have considered the same under proper instructions. The court, however, erroneously instructed the jury to the effect that plaintiff's honesty was not in issue in the case.

It also appears that two of the leases, on which plaintiff claimed a commission and which was allowed by the jury, are on the same premises, - plaintiff's Exhibit 9, which is a lease commencing December 5, 1924, at a rental of \$175 a month to September 30, 1929, and plaintiff's Exhibit 10, which is a lease commencing June 1, 1925, at a rental of \$150 a month, ending May 31, 1926. Plaintiff admitted receiving commissions on both of these leases, whereas the evidence shows that no rent was collected by plaintiff on the lease Exhibit 9, at least after June 1, 1925.

It is also in evidence that Jacobs & Company, defendant's prior agents, had deducted \$292 from moneys belonging to defendant, and as a consideration for the employment of plaintiff as defendant's agent, plaintiff agreed with defendant to take care of this \$292; this was never done and was the subject of a claim of set-off. Although the evidence of this was undisputed, it was ignored by the jury.

There was no competent evidence on which to base the amount of the verdict. Plaintiff claimed 7% on the leases in question for the first year and 1% for each year thereafter, and a witness testified that this was according to the schedules and rules of the Chicago Real Estate Board. This is not sufficient either to establish the reasonable value of a custom. West and Dry Goods Store v. Mann, 133 Ill. App. 544.

The verdict is so clearly against the weight of the evidence that the judgment thereon will not be allowed to stand. It is reversed and the cause remanded.

REVERSED AND REMANDED.

Ketchett, P. J., and O'Connor, J., concur.

THE CITY NATIONAL BANK OF
TIPTON, IOWA, a Corporation,
Appellant,

vs.

W. J. O'BRIEN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MOHRMANN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant as guarantor on four promissory notes, and upon trial the jury found in favor of the defendant and from the judgment that it take nothing plaintiff appeals.

The four promissory notes were executed by the Standard Trunk Company, dated January 24, 1934, aggregating \$7500, due 180 days after date, payable to the City National Bank of Tipton, Iowa, the plaintiff, with interest at six per cent. The payment of these, when due, was guaranteed by the endorsement of the defendant. The defenses asserted were: (1) That without the consent of the defendant, plaintiff entered into a contract with the maker of the notes, the Standard Trunk Company, by which the maker was granted additional time in which to pay the notes; (2) that plaintiff received from the Standard Trunk Company a chattel mortgage conveying certain of its property to secure the notes, that plaintiff foreclosed the chattel mortgage and thereby recovered certain sums in partial satisfaction of the notes; and (3) that said notes had been fully paid and discharged by the execution of other notes which were received by the plaintiff in full payment of the notes sued on.

The jury could properly find from the evidence that in January, 1933, the Standard Trunk Company was engaged in the manu-

245 A. 035

UNITED STATES DEPARTMENT OF JUSTICE
DIVISION OF INVESTIGATION
WASHINGTON, D. C.

REPORT FROM FIELD OFFICE

OF MEMPHIS

TO DIRECTOR, BUREAU OF INVESTIGATION

FROM SAC, MEMPHIS (100-100000)

SUBJECT: [Illegible]

RE: [Illegible]

DATE: [Illegible]

BY: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

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14. [Illegible]

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factory of trunks at Tipton, Iowa, doing its banking business with the plaintiff. V. A. Goode was president of the Trunk company, lived in Tipton and was a friend of the defendant, and lived in Chicago. In 1922 the Trunk company was indebted to the bank in the sum of about \$4500. In January, 1923, Goode applied to the bank for a further loan and was told by plaintiff's president to secure the enforcement of the notes by some one financially responsible. An arrangement was then made to lend the Trunk company an additional \$3,000 provided it could secure the guaranty of the defendant. The president of the bank and Goode went to Chicago and interviewed defendant for the purpose of securing his guaranty. Defendant agreed to endorse the notes provided the bank would take a chattel mortgage on the property of the Trunk company and that he would be liable only for any amount above that which might be collected on the chattel mortgage. This was agreed upon and thereupon the defendant endorsed the notes, which became due July 20, 1923. The agreement as to the chattel mortgage was confirmed about the same time by letter from the defendant to the bank. Accordingly the Trunk company executed a chattel mortgage to secure the sum of \$7500; it provided that the mortgage should be security for the aforesaid notes and also for any other moneys thereafter advanced by the bank.

The four notes were not paid when they fell due, but renewal notes in the same amount were executed and endorsed by the defendant in the same manner, falling due six months thereafter on January 24, 1924. When these became due they were renewed by similar notes endorsed by the defendant. These last notes became due July 24, 1924, and it is upon these that suit is brought. When these notes became due, July 24, 1924, the Trunk company desired to secure a further extension and the president of the plaintiff bank gave Goode four new notes to be signed as renewals and requested

him to have the defendant endorse them in the same manner as he had endorsed the prior notes. Before this time, Mr. Rutloff, then the president of the plaintiff bank, had examined the manufacturing plant of the Frank company and had expressed satisfaction over its apparent prosperity.

Goode took these four notes to defendant, who refused to endorse them. Goode testified that he took them back and gave them to Mr. Geiger, then the president of the plaintiff bank, and told him that defendant had refused to endorse them and that he could not furnish any other endorsers; that Geiger took the notes and said that the bank would go along with Goode without defendant's endorsement, but that he would like to keep the old notes in his possession to be used by the bank examiner and that he would then return the notes endorsed by O'Brien to Goode, that in his opinion the stock of merchandise was enough to secure the notes without any endorsement. Goode says that, although he asked for them, Geiger did not return the old notes. Geiger categorically denies this conversation with Goode and denies that he received any notes from him without defendant's endorsement. Another witness connected with the bank also testified that he had never heard of these new notes, although he had nothing to do with the handling of any of these notes.

As tending to support Goode's version, it appears that after July 24, 1924, the officials of the bank examined the stock of merchandise of the Frank company and expressed themselves as satisfied with the condition of affairs. Although the notes sued on matured July 24, 1924, no demand for payment was made on defendant until a short time prior to the commencement of this suit, which was September 2, 1925. July 22, 1924, defendant had written to plaintiff, stating that Goode had been in to see him with a request to endorse

the notes, but for reasons stated in the latter defendant refused to do so.

The evidence of Goede and Geiger is in direct conflict. The jury had the opportunity of passing upon the credibility of the witnesses by observing their demeanor while testifying, which we do not have. Neither story is inherently improbable, and there are certain circumstances surrounding the transaction which give greater weight to Goede's version. We are unable to say that the conclusion of the jury in this respect is manifestly contrary to the weight of the evidence.

The evidence went to support the defense that plaintiff had extended the time of payment without the consent of the defendant and had also taken new notes from the Trunk company in payment of the notes upon which suit is brought. Article VIII, Section 119, Paragraph 5, Negotiable Instruments Act, provides that a person secondarily liable on a note is discharged by an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, unless with the assent of the one secondarily liable or unless the right of recourse against such party is expressly reserved. Schrader v. Heflebower, 243 Ill. App. 139. It is also the rule that when new notes are given and accepted in payment of prior notes, they operate as payment of the same and to release the guarantor. The questions whether the new notes were given and whether they were accepted in payment of the notes sued upon were questions for the jury. Boulter v. Jellist Nat'l Bank, 295 Ill. 594.

Plaintiff says that it was improper to admit evidence as to the proceeds of the sale under the chattel mortgage. It was the agreement that defendant would be liable only for the difference between the amount of the notes and the amount derived from any sale

The witness of Goetz and Goetz is in direct con-
flict with the testimony of Goetz in the other
cases of the witness by observing their behavior while
sitting, which we do not have. Neither Goetz is inherently in-
credible, and there are certain circumstances surrounding the
incident which also greater weight to Goetz's version. We
are unable to say that the conclusion of the jury in this respect
is manifestly contrary to the weight of the evidence.
The court thus went to support the defense that Goetz

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under the chattel mortgage. Nearly a year after the notes sued on became due the property described in the chattel mortgage was sold and plaintiff purchased it for \$3800 and immediately resold it for \$5100. No part of the proceeds of the sale was applied upon the notes sued on. This evidence was material and relevant to the defense that defendant was entitled to have credited upon these notes whatever was received from the sale. It is immaterial only because of the conclusion of the jury that defendant was not liable for any amount.

Other points are made in the brief for plaintiff, but the decision of this case turns upon the conclusion of the jury on the facts. There is no sufficient reason presented for holding the verdict improper, and the judgment is affirmed.

AFFIRMED.

Ketchett, P. J., and O'Connor, J., concur.

J. L. SLAUGHTER,
Appellee,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSHURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, upon trial by the court in an action to recover damages to his automobile by reason of the alleged negligent operation of a cab belonging to the defendant, had a judgment for \$200, which we are asked to reverse.

About 12:50 a. m., on November 3, 1925, plaintiff was driving his automobile in a westerly direction on 60th street near Cottage Grove avenue in Chicago. There is a double street car track on Cottage Grove avenue, the easterly track being used for north-bound traffic and the westerly track for south-bound traffic. To the north of 60th street and separated from it by a parkway is the Midway, which consists of two boulevards running parallel to 60th street. The traffic at this point is controlled by red and green lights which alternate. As plaintiff approached Cottage Grove avenue he saw the red lights against the north and south traffic and saw some automobiles standing on Cottage Grove avenue headed north, waiting for the green light. Plaintiff stopped his automobile before he reached Cottage Grove avenue, as it is a through street. The street intersection was well lighted. Plaintiff started and proceeded across Cottage Grove avenue. He said that he saw no cars coming from south of 60th street on the east side of Cottage Grove avenue. He crossed the north-bound street car track and was in the act of crossing the south-bound track when defendant's cab coming from the south on the south-bound

street car track, which would be the wrong side of the street, struck plaintiff's automobile about the center and carried it clear across to the curb on the northwest corner of Cottage Grove avenue and 60th street. Plaintiff testified that defendant's cab came so quickly and fast that he did not see it before he was struck.

The only point presented by defendant's counsel is that plaintiff was guilty of contributory negligence. We cannot agree with this. Plaintiff had crossed the north-bound track where he might reasonably anticipate north-bound cars. He was struck on the west side of the street by defendant's cab traveling north, going fast. He had no reason to anticipate that defendant would be driving on the wrong side of the street. Anticipation of negligence in others is not a duty which the law imposes. Chicago City Ry. Co. v. Fenimore, 199 Ill. 9; Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154. While it is true that a party has no right knowingly to expose himself to danger and then recover damages for injuries received which he might have avoided by the use of reasonable caution, yet under the instant circumstances the court could properly find that plaintiff, in the exercise of reasonable care, could not anticipate that defendant's cab would come north on the west side of the street, and that therefore plaintiff's conduct was not negligence contributing to the accident. We see no convincing reason for disagreeing with this conclusion.

Defendant's counsel in his argument, but not in his brief of points, indulges in some animadversions on the remarks of the trial court, but as matters presented in argument are confined to points made in the brief, we cannot consider them. Rule 19, Appellate Court.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

street car tracks, which would be the wrong side of the street,
struck plaintiff's automobile about the corner and carried it
clear across to the curb on the northwest corner of College Grove
avenue and 40th Street. Plaintiff testified that defendant's car
came so quickly and fast that he did not see it before he was struck.
The only point presented by defendant's counsel in this

plaintiff was guilty of contributory negligence. We cannot agree
with this. Plaintiff had crossed the north-bound track where he
might reasonably anticipate north-bound cars. He was struck on the
west side of the street by defendant's car traveling north. Going
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ing on the east side of the street. Anticipation of negligence in
others is not a duty which the law imposes. See Ill. v. ...
1933 Ill. 134. While it is true that a party has no right knowingly
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received which he might have avoided by the use of reasonable con-
dition, yet under the instant circumstances the court could properly
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of the street, and that therefore plaintiff's conduct was not negli-
gent contributory to the accident. We see no convincing reason for
distancing with this conclusion.

Defendant's counsel in his argument, but not in his brief
at points, insisted in some immaterialities on the merits of the
trial court. But no matters presented in argument are confined to
points made in the brief, as we have considered them. Ill. v. ...
points made.

JOHN KALCHERENBER,)
Appellee,)
vs.)
JULIUS WEINBERG,)
Appellant.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a certain order, but his brief filed in this court fails to comply with rule 19 of this court, so that we have had difficulty in understanding the merits of the controversy.

We gather that this is an appeal from an order denying the motion of defendant brought under section 21 of the Municipal Court act to vacate and set aside a prior judgment against him for \$1246.76. Neither is the brief nor abstract of defendant are the dates given when this judgment was entered and the petition filed. By referring to the record it appears that the judgment was entered November 9, 1926, and the petition to vacate the same was filed January 20, 1927, or approximately forty-two days after the term had expired at which the judgment was entered. We have ascertained that plaintiff's claim was on the written guaranty of the defendant of the performance by the lessee of the covenants of a lease made by plaintiff to Ben Friedberg leasing certain premises in Chicago at a rental of \$135 a month, which lease expired April 30, 1926; that Ben Friedberg abandoned the premises prior to December, 1925; that plaintiff, after due diligence, made a lease to a new tenant at \$110 a month, which it asserted was the highest rental that plaintiff could obtain.

Suit was brought against defendant on his guaranty for the unpaid rent and for the difference between the rental called for by the lease and the rental paid by the new tenant.

ATTORNEY GENERAL
OF CHICAGO

JULIUS WEINSTEIN
Assistant

MR. JUSTICE KENNEDY DELIVERED THE DECISION OF THE COURT.

Defendant appeals from a certain order, but his brief
titled in this court fails to comply with the rule of this court.
It may be that the brief is defective, but the court is not
competent to decide.

The court then in an appeal from an order denying
the motion of defendant brought under section 21 of the Municipal
Code and to vacate and set aside a prior judgment against him for
\$1000.00. Further in the brief not abstract of defendant are the
facts given when this judgment was entered and the petition filed.
By reference to the record it appears that the facts are as follows:

February 9, 1936, and the petition to vacate the same was filed
January 30, 1937, or approximately forty-two days after the term
had expired at which the judgment was entered. We have ascertained
that plaintiff's claim was in the written warranty of the defendant
at the premises by the lease of the premises of a lease made
by plaintiff to Ben Friedberg, having certain premises in Chicago
at a rental of \$100 a month, which lease expired April 30, 1936;
and Ben Friedberg assigned the premises prior to December, 1935;
that plaintiff, after the 31st day, made a lease to a new tenant
at \$100 a month, which is asserted was the highest rental that
plaintiff could obtain.

This was brought against defendant on his warranty
that he would rent and for the difference between the rental
called for by the lease and the rental paid by the new tenant.

Summons was issued and defendant appeared by his attorneys. Various affidavits of merits were filed, which were ordered stricken by the court, and the time extended to file an amended affidavit of merits. The last extension expired October 30, 1936. The case was on the trial call for November 9th, when an order of default was entered against defendant for failure to file an amended affidavit of merits and judgment was entered.

On the afternoon of November 9th the attorneys for the plaintiff notified defendant's attorneys of the entry of the judgment on that day and again on November 17th a letter was written by plaintiff's attorneys to defendant's attorneys advising of the entry of the judgment. Conversations were had over the telephone between the lawyers, in which the defendant's attorneys asked the plaintiff's attorneys to stipulate to vacate the judgment, which was refused, but defendant's attorneys were told that they had the privilege of making a motion to vacate the judgment at any time within thirty days. Such motion was not made until approximately seventy-two days after the entry of judgment.

Plaintiff filed an answer to the petition, supported by the affidavit of his attorney. Certain papers called affidavits appear in the record, apparently on behalf of the defendant, but they are not signed by anyone nor is there any signature or seal of a notary public.

By section 21 of the Municipal Court act, chapter 37, it is provided that a petition to vacate a judgment must set forth such grounds as would be sufficient to cause the judgment to be vacated by a bill in equity. The petition must show that the judgment is inequitable and unjust and that it was not due to any negligence on defendant's part. Gallay v. Mathis, 195 Ill. App. 170; American Surety Co. of N. Y. v. Elias, 214 Ill. App. 463; Imbrie v. Bear, 230 Ill. App. 155.

...was issued and defendant answered by his attorney. Various affidavits of merits were filed, which were ordered struck by the court. The time extended to file an amended affidavit of merits. The last extension expired October 30, 1934. The case was on the trial call for November 2nd, when an order of default was entered against defendant for failure to file an amended affidavit of merits and judgment was entered.

On the afternoon of November 2nd the attorney for the plaintiff notified defendant's attorney of the entry of the judgment on that day and again on November 17th a letter was written by plaintiff's attorney to defendant's attorney advising of the entry of the judgment. Conversations were had over the telephone between the lawyers, in which the defendant's attorney asked the plaintiff's attorney to withdraw his motion to set aside the judgment, but defendant's attorney was told that such would not be granted. A motion to set aside the judgment was made at that time, but was not granted. The court said that the judgment was not set aside and that the case would be brought back for trial.

Plaintiff filed a motion to set aside the judgment, which was denied by the court. The court said that the judgment was not set aside and that the case would be brought back for trial. The court said that the judgment was not set aside and that the case would be brought back for trial.

Plaintiff filed a motion to set aside the judgment, which was denied by the court. The court said that the judgment was not set aside and that the case would be brought back for trial. The court said that the judgment was not set aside and that the case would be brought back for trial.

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Defendant's petition fails to show a meritorious defense. It asserts that Ben Friedberg sold his business to his brother, John Friedberg, who took possession of the premises, and that by plaintiff accepting the latter as his tenant defendant was released as a guarantor. Insofar as these are allegations of fact, they are denied in the answer of plaintiff, and the allegation that defendant was released is a conclusion which does not necessarily follow from the facts claimed. The lease provided that, upon abandonment or vacation of the premises, the landlord might re-rent the same and apply the moneys so received toward the rent due from the first tenant.

The petition fails to show due diligence on the part of the defendant. The only allegation of the petition in this respect is that he had exercised due diligence in that he retained and engaged Bernstein & Gordon as his attorneys. Mr. Bernstein's affidavit asserts that plaintiff's attorney stated that he would not take any advantage by reason of the defendant not having filed an affidavit of merits. This is denied by plaintiff's attorney. Furthermore, it appears that defendant's attorneys were notified repeatedly within thirty days after the entry of the judgment that the judgment had been entered, but made no move to have it vacated within that time.

The court properly denied the motion to vacate the judgment, and the order is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

Defendant's petition fails to show a possession of the premises. It asserts that Dan Wilsberg sold his business to his brother, John Wilsberg, who took possession of the premises, and that by plaintiff asserting the latter as his tenant defendant was released as a landlord. Insofar as these are allegations of fact, they are denied in the answer of plaintiff, and the allegations that defendant was released is a conclusion which does not necessarily follow from the facts claimed. The lease provided that, upon abandonment or vacation of the premises, the landlord might remove the same and apply the money so received toward the rent due from the first tenant. The petition fails to show due diligence on the part of the defendant. The only allegation of the petition in this respect is that he had examined the title and found that he retained and signed for a title & Gordon as his attorney. Mr. Kewenstein's affidavit asserts that plaintiff's attorney stated that he would not take any advantage by reason of the defendant not having filed an affidavit of merit. This is denied by plaintiff's attorney. Furthermore, it appears that defendant's attorneys were notified twenty days after the entry of the judgment that the judgment had been entered, but made no move to have it vacated at that time. The court properly denied the motion to vacate the judgment, and the order is affirmed.

ATTEST:

WITNESSES:

W. J. O'Connor, J., Clerk.

W. J. O'Connor, J., Clerk.

W. J. O'Connor, J., Clerk.

W. J. O'Connor, J., Clerk.

THE ATLAS CHINA COMPANY,
a Corporation,

Appellee,

vs.

HILLMAN'S, a Corporation,
Appellant.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McHENNELLY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover for goods sold and delivered to defendant, upon a trial by the court had judgment for \$200, from which defendant appeals. This judgment depends upon the authority of the representative of the defendant who ordered the goods from plaintiff.

Plaintiff asserts that March 5, 1928, a Mr. Mehlmann called at plaintiff's place of business and had an interview with Mr. John F. Egan, its Chicago representative, with reference to giving it an order on behalf of Hillman's for certain chinaware. Mehlmann, after examining the samples, made a notation and told Egan that he would notify him in a short time whether to place the order and that he wanted the goods rushed when the order came. March 8th Mehlmann 'phoned Egan, giving an order for the merchandise. The order was forwarded to plaintiff's factory at Liles, Ohio, and the goods were shipped to defendant March 20th, and at the same time an inventory or bill showing the details of the sale was forwarded to defendant. Pursuant to a telephone message, Egan called on Mr. Burns, defendant's president, in the first week of April and was informed that defendant had changed buyers and that it had no use for the merchandise which Mehlmann had ordered. Egan testified that he replied that he was simply a local representative and had no authority to act further than he had done; that his recollection was that he was told that the goods were in the possession of defendant in its store or its warehouse.

2481.A.652

ALBANY FROM THE MUNICIPAL COURT
OF CHICAGO.

THE ALBANY COUNTY COURT
A COURT OF
THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1906
ALBANY, N. Y.

IN SENATE
JANUARY 1, 1906
ALBANY, N. Y.

PROSECUTOR, ALBANY, N. Y.
IN SENATE
JANUARY 1, 1906
ALBANY, N. Y.

PROSECUTOR, ALBANY, N. Y.
IN SENATE
JANUARY 1, 1906
ALBANY, N. Y.

The defense made is that Mehlmann had no authority to give the order on behalf of the defendant. Cases are cited stating the law as to one who undertakes to deal with an agent, that he is put upon inquiry and must discover at his peril the nature and extent of such agent's actual authority, and that a party cannot rely upon an agent's apparent authority unless there is a representation by the principal, a reliance on such representation and a change of position by such party in reliance on such representation. All of the citations tend to support the points made, but have no application whatever to the instant case. It is established by the testimony of the defendant by Burns, its president, that at the time the order was given to plaintiff Mehlmann was the buyer for the defendant of house furnishings, china and glassware. If Mehlmann was in fact the buyer for defendant of chinaware, he was not only acting within the scope of his apparent authority but acting within the scope of his actual authority.

Defendant seeks to show that its buyers had only a limited authority by claiming that in 1923 it sent to the plaintiff and other concerns from which it was purchasing goods a mimeographed circular letter notifying such sellers that all orders are void unless given in writing on the printed form of the defendant and approved by an officer of the company or one of the merchandise managers. There was an attempt made to show that such a notice was sent to plaintiff, but this failed of proof. This left the record showing that no notice had been brought to plaintiff's attention of any limitation or restriction upon its buyers in the matter of placing orders.

There is some conflict in the stories of the witnesses as to the ultimate destination of the goods. Burns testified that they were placed in defendant's warehouse at the request of Egan. This is denied by Egan. We do not deem it important except as

The defendant made in that defendant had no authority to
give the order on behalf of the defendant. Cases are cited stating
the law as to the defendant's duty in such cases, that he is
not bound to make discovery of his goods the nature and ex-
tent of such agent's actual authority, and that a party cannot rely
upon an agent's apparent authority unless there is a representation
by the principal, that there was an such representation and a change of
position by the party in reliance on such representation.
At the trial the defendant sought to support the points made, but none were avail-
able whatever to the instant case. It is established by the law
of the defendant by the defendant, that at the time
the order was given to plaintiff's defendant was the owner for the
defendant of houses, furnishings, etc. and elsewhere. If defendant
in fact the order for defendant of defendant, he was not only
acting within the scope of his apparent authority but acting within
the scope of his actual authority.
Defendant seeks to show that the order was only a
limited authority by claiming that in 1905 it went to the plaintiff
and other concerns from which it was purchasing goods - merchandise
and other matters relating to such orders that all orders are void
unless given in writing on the printed form of the defendant and
approved by an officer of the company or one of the merchandise
managers. There was an attempt made to show that such a notice was
sent to plaintiff, but this failed at trial. This left the plaintiff
showing that no notice had been brought to plaintiff's attention of
any limitation or restriction upon the powers in the matter of
plaintiff's order.
There is some conflict in the evidence of the witnesses
as to the ultimate destination of the goods. It was testified that
the goods were in defendant's warehouse at the request of the
plaintiff.

showing that the goods were delivered to the defendant.

The case hinges upon the authority of Kehlmann, the buyer, to place the order, and this authority is confirmed by the evidence of the defendant. The judgment is affirmed.

AFFIRMED.

Hatchett, F. J., and O'Connor, J., concur.

BERNARD P. CONWAY, Administrator
of the Estate of Charles M. Cornell,
Deceased,

Appellee,

vs.

YELLOW CAB COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE McSHEERY DELIVERED THE OPINION OF THE COURT.

In an action brought by Charles M. Cornell to recover damages for personal injuries he had a verdict against defendant for \$20,000. He remitted \$8,000 and judgment was entered for \$12,000, from which defendant appeals. Thereafter Cornell died and on motion made in this court the administrator of his estate was made party plaintiff. We shall hereinafter describe Cornell as plaintiff.

At about a quarter past two o'clock in the afternoon of January 19, 1925, while plaintiff was attempting to cross from the west to the east side of Michigan boulevard in Chicago, along the north cross-walk at VanBuren street, he was struck by a cab of the defendant which was going south on Michigan. At this point Michigan boulevard is about seventy-five feet wide from curb to curb. About the center of the north cross-walk is a safety island of concrete from which projects a post on which, about four or five feet high, is a red bull's eye light. This light is permanent, not a traffic light. About seventy-five feet south in the center of Michigan boulevard is another safety island with a concrete post on which are the three traffic signal lights - red, amber and green. These change at intervals and generally speaking, the green light is the signal for traffic to proceed and the red light for it to stop.

A Yellow cab driven by Frank Matthews was going south on Michigan about five feet from the west curb. A little behind him and

to his left was a second Yellow cab driven by Oscar Seigel. It was this second cab which struck the plaintiff. On Seigel's left and slightly to the rear was a private automobile driven by Roy Henson. A pedestrian, L. H. Alexander, was on the west side of Michigan boulevard, about 100 feet north of Van Buren street when the accident happened. These men were eye-witnesses and together with the plaintiff testified as to the occurrence.

Alexander, a disinterested witness, said that he was walking southward toward VanBuren street and noticed the plaintiff step off the west curb and start east toward the safety island. At this time the two Yellow cabs were north of Alexander. When they passed him, the plaintiff was about half-way between the curb and the north safety island. At this time he noticed plaintiff turn his head to the left, then start to increase his pace, but when he got within four or five feet of the safety island the second Yellow cab overtook him and knocked him down. He says the Yellow cabs were traveling about thirty miles an hour; that the one in front, which would be the one driven by Matthews, slowed down somewhat as it approached the intersection, but that the second Yellow cab pulled to the left to pass the other cab; that when plaintiff started to cross Michigan avenue the red lights were against the north and south traffic and that they changed during the time when plaintiff was walking from the curb to the island, so that at the time the cab struck him the lights were green north and south.

Henson testified in substance that he was a half or three-quarters of a block north of Van Buren street when he noticed plaintiff and other pedestrians crossing Michigan on the north crosswalk at Van Buren street. He corroborates Alexander as to the speed of the cabs, saying that all three automobiles were traveling better than thirty miles an hour; that he saw plaintiff crossing the street and saw him struck by the Yellow cab. He testified definitely that, when he first observed plaintiff starting across the street, he and

the two Yellow cabs were between half and three-quarters of a block away.

Plaintiff testifying said that at the time of the accident he was seventy-one years of age; that his residence was in Valentine, Nebraska, a town of 1300 population; that he was not familiar with the traffic signals in Chicago; that when he came to the street intersection he examined the lay of the land to see whether there were automobiles, as he intended to cross Michigan boulevard going east; that as he approached the curb he saw one car almost directly opposite and looked to the north to see what the clearance was and he did not see anything far about two hundred feet. He did not see the traffic signals; he saw only the bull's eye light on the north safety island; that he was right up to this safety island when he was struck. He said he thought he had plenty of room between the car that passed him and the cars coming from the north to give him a chance to go through; that he thought they were so far back that he had plenty of time to get across.

Matthews testified that when he saw plaintiff in front of him he swung his car to the right and did not strike him; that he had not noticed the other Yellow cab before the accident and did not see the accident.

Seigel testified that the traffic light was green at VanBuren street and when he approached he was going eighteen or twenty miles an hour; that he saw the cab to the right of him swing slightly to his right and at the same time saw plaintiff in front of his cab; that he swung to the right and put on his brakes; that his cab struck plaintiff; that plaintiff was fifteen or twenty feet ahead of his cab when he first saw him.

All three drivers of the cars - Hansen, Matthews and Seigel - had a clear and unobstructed view of the VanBuren street crossing as they approached it. Hansen had noticed plaintiff when

the two yellow caps were between half and three-quarters of a block

Witness testified that at the time of the case

that he was conversing with him; that his conversation was in
Volostine, Kobovskiy, a son of John Kobovskiy; that he was not

that when he came to

that when he was struck. He said he thought he was afraid of death
because he was that honest in and the case coming from the north

that testified that the traffic light was green as
he when he approached he was going straight on

the street of the case - Kobovskiy, Kobovskiy was
and unobstructed view of the street ahead

he was half a block away and noted that he was an elderly man who lagged somewhat behind the other pedestrians who were crossing at that time. He testified that as the Yellow cab struck the plaintiff he was thrown high in the air and when he came down he was lying near the center of VanHuren street; that when the cab struck him it skidded about fifteen feet and ran into the Yellow cab which was running on its right. Plaintiff was taken to a hospital, where he was found to be seriously injured. The extent of his injuries is not questioned.

In addition to the ordinary counts alleging negligence on the part of the defendant and due care on the part of the plaintiff, there was an additional count alleging that the defendant wantonly and wilfully ran upon and struck the plaintiff.

Defendant first argues that there was no evidence to go to the jury upon this additional count. It has been said many times under similar circumstances that it is a question of fact for the jury to determine whether the defendant is guilty of such recklessness in driving an automobile as amounts to wilful infliction of injuries upon another. People v. Schwartz, 298 Ill. 218; People v. Cambaris, 297 Ill. 455; Williams v. English, 242 Ill. App. 166.

Even if the green traffic lights are shown, the driver of an automobile is not thereby relieved from the usual requirements of reasonable care and caution in driving. The green light is not an invitation to close his eyes to pedestrians, neither is it a permission to proceed regardless of consequences. It is, at most, an indication that he may go forward but still under the obligation to exercise reasonable care and caution in the management and operation of his vehicle so as thereby to avoid striking pedestrians.

The jury could reasonably conclude that the driver, Seigel, should have been on the lookout for pedestrians crossing

Van Buren street and in the exercise of reasonable care he should have seen plaintiff starting to cross Michigan boulevard at the same time when he was seen by others, namely, when he, Seigel, was at least half a block away. The jury evidently concluded that his failure to see the plaintiff and his conduct in approaching Van Buren street at thirty miles or more an hour and striking plaintiff, amounted to the wanton and wilful infliction of injury. We cannot say that this conclusion is clearly against the preponderance of the evidence.

All the other questions of fact, namely, negligence of the defendant and care of the plaintiff, were properly submitted to the jury, and its judgment on these questions will not be disturbed.

Complaint is made of the giving and refusal of instructions. The first instruction complained of is plaintiff's instruction which attempts to state the law as to wanton and wilful negligence. It is open to the criticism that it fails clearly to do this, as it is cumbersome in expression and lengthy. We doubt if it would enlighten the jury in any manner whatever. While we do not approve of the instruction, we cannot say it was likely to mislead the jury. Criticisms are made of other instructions which are in many respects deserved, but we cannot say that the trial court committed reversible error with reference to them.

The determination of the case turns upon the finding of the jury on questions of fact, and we cannot say that this conclusion is so clearly contrary to the weight of the evidence as to require a reversal. The judgment is therefore affirmed.

AFFIRMED.

Ketchett, P. J., and O'Connor, J., concur.

The first effect of the law is to make it impossible for a person to be a member of a corporation unless he is a resident of the State. This is a very important provision, as it prevents the formation of corporations by persons who are not residents of the State. It also prevents the formation of corporations by persons who are not citizens of the State. This is a very important provision, as it prevents the formation of corporations by persons who are not residents of the State. It also prevents the formation of corporations by persons who are not citizens of the State.

The second effect of the law is to make it impossible for a person to be a member of a corporation unless he is a resident of the State. This is a very important provision, as it prevents the formation of corporations by persons who are not residents of the State. It also prevents the formation of corporations by persons who are not citizens of the State. This is a very important provision, as it prevents the formation of corporations by persons who are not residents of the State. It also prevents the formation of corporations by persons who are not citizens of the State.

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PETER MORSELEY,
Appellee,

vs.

M. H. RITZWOLLER COMPANY,
a Corporation, and ROCKWOOD
SPRINKLER COMPANY, a Corporation,
Defendants.

M. H. RITZWOLLER COMPANY, a
Corporation,
Appellant.

2451-1806
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE MORSELEY DELIVERED THE OPINION OF THE COURT.

Plaintiff while working in the cooperage plant of the M. H. Ritzwoller Company, hereinafter called the defendant, stepped into a kettle of hot silicate of soda, receiving injuries. He brought suit for damages against the Ritzwoller Company and the Rockwood Sprinkler Company. The jury was instructed to find the Rockwood Sprinkler Company not guilty. The trial proceeded as to the Ritzwoller Company, which was found guilty and the damages assessed at \$1,000. Upon this verdict judgment was entered, from which the defendant appeals.

Defendant's plant is at 48th street and Hoyne avenue in Chicago. A wing of the building about sixteen to twenty feet square extends along Hoyne avenue in a northerly direction. There is a door in the north wall of this wing opening into the yard. In the west wall of the wing, near to the angle with the north wall of the main building which runs west, is another door. On the day of the accident plaintiff was building a "valve house", a wooden structure about eight feet square, in the angle between the west wall of the wing and the north wall of the main building. A little to the south of the door in the west wall and on the inside of the wing and about two feet from the west wall was a barrel or kettle of silicate of soda about three feet in diameter,

200 - 2307

RECEIVED FROM DIRECTOR

COURT OF COCK COUNTY

W. E. KIRKMAN, JR.,
Attorney at Law,
Cock County, Virginia.

W. E. KIRKMAN, JR.,
Attorney at Law,
Cock County, Virginia.

THE JUDICIAL RECORDS RELATIVE TO THE COURT OF COCK COUNTY

Plaintiff's Exhibit - 1st volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 2nd volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 3rd volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 4th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 5th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 6th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 7th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 8th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 9th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

Plaintiff's Exhibit - 10th volume of the

W. E. Kirkman, Jr., Attorney at Law, Cock County, Virginia.

two or three feet deep, and the top of this was flush with the concrete floor.

The Rockwood Sprinkler Company had a contract with defendant to install a sprinkler system, which included the erection of this and other valve houses. The foreman of the Sprinkler company took plaintiff, who was a carpenter contractor, to the plant and showed him the location of the valve houses to be built; plaintiff's price for furnishing labor and material was accepted and he started on the construction. Plaintiff was told by the Sprinkler company's foreman that he should build this valve house in the angle of the building large enough so that the valve could be turned from the inside of the shed. On the morning of July 24, 1925, plaintiff carried his tools through the north door of the wing and walked in a southwesterly direction through the building, passing to the right of this barrel or kettle and through the door in the west wall, alongside of which he was to build the valve house. During the morning he laid out the frame work and had nailed some boards on one side of the valve box. At noon he went back to the yard to eat his lunch. After lunch he went back to his work and went a little south of a direct pathway between the two doors in order to see if he had left a sufficient opening in the west door, as directed by the foreman of the Sprinkler company. He stood there "taking a view of it." When he saw the work was all right he started straight ahead and stepped with his right foot into the Kettle of silicate, which was then uncovered. Plaintiff had not seen this barrel or kettle before. There is evidence that the place was not very light; the light is described as "medium."

Defendant first argues that, as plaintiff was a subcontractor of the Rockwood Sprinkler Company, he was merely a licensee on the premises, to whom the defendant owed no duty ex-

two or three feet deep, and the top of this was flush with the concrete floor.

The Greenwood Sprinkler Company had a contract with defendant to install a sprinkler system, which included the erection of this and other valve houses. The foreman of the sprinkler company took plaintiff, who was a competent contractor, to the plant and showed him the location of the valve houses to be built;

plaintiff's price for furnishing labor and material was accepted and he started on the construction. Plaintiff was told by the sprinkler company's foreman that he should build this valve house in the angle of the building large enough so that the valve could be turned from the inside of the shed. On the morning of July 26,

1930, plaintiff carried his tools through the north door of the building and walked in a southeasterly direction through the building, entered to the right of this barrier or hedge and through the door to the west wall, alongside of which he was to build the valve house. During the morning he laid out the frame work and had

waited some hours on one side of the valve box. At noon he went back to the yard to eat his lunch. After lunch he went back to his work and went a little north of a direct pathway between the two sheds in order to see if he could find a better place for the

west door, as directed by the foreman of the sprinkler company. He stood there "taking a view of it." When he saw the work was all right he started straight ahead and stepped with his right foot into the hedge of alfalfa, which was then uncovered. Plaintiff had not seen this barrier or hedge before. There is evidence that the place was not very light; the light is described as

"dim."

Defendant first argues that, as plaintiff was a subcontractor of the Greenwood Sprinkler Company, he was merely a licensee on the premises, so when the defendant owed no duty to

cept to refrain from wilfully or wantonly injuring him. Plaintiff was more than a mere licensee. He was upon the premises as an invitee. A licensee ordinarily is one who goes upon another's premises for purposes of his own and not for any purpose connected with the business of the occupant. Police officers, inspectors and firemen have been held to be licensees. But where one comes upon the premises either as an original contractor or as an employee of such contractor or as a subcontractor to do work connected with the business of the occupant, he comes upon the implied invitation of such occupant. Pauskner v. Waken, 231 Ill. 276. An owner or occupant of premises, who by invitation, express or implied, permits others to go upon the premises for any purpose connected with the business in which the occupant is engaged, is liable for injuries occasioned by the unsafe condition of the premises, if such condition was known to him and not to the invitee; and if there is a hidden danger upon the premises he must use ordinary care to give persons rightfully upon the premises warning thereof. Calvert v. Springfield Light Co., 231 Ill. 290. Where one, for the purposes of his own business, contracts for work with another which involves bringing upon the premises a third person, such third person is upon the premises as an invitee and the owner is obligated to exercise reasonable care for his safety while upon the premises. Berry Lumber Co. v. Huggan, 182 Ill. 218. Plaintiff was an invitee upon the premises of the defendant, and the defendant was obligated to use ordinary care to give him warning of hidden dangers.

It is next argued that plaintiff was guilty of contributory negligence in failing to see the kettle. Before the accident happened plaintiff had passed the location of the kettle only three times; he did not know it was there. His helper, Hansen, who passed from one door to the other frequently during the morning,

carrying material, says that he knew there was "something" there but did not know it was a kettle because it was covered. The jury could reasonably infer that the cover was removed sometime during the noon hour. It was somewhat dark at the place, and the jury could properly believe that the kettle was a hidden danger, of which defendant in the exercise of ordinary care should have warned the plaintiff, and that failing to see the kettle under the circumstances was not contributory negligence on the part of the plaintiff. Questions of this kind are ordinarily for the jury to determine, and unless we can say that its conclusion is against the weight of the evidence, its verdict will not be disturbed.

It was said to be improper to permit plaintiff to testify as to the amount of the doctor's bill paid by him on the ground that the charge was not proven to be fair and reasonable. The Supreme Court has held that in the absence of any other testimony, the payment of a bill is prima facie evidence of its reasonableness. Wicks v. Cuneo-Henneberry Co., 319 Ill. 344; Kyalga v. Matheson, 328 Ill. 369.

It is said to be reversible error because the plaintiff testifying indicated that the defendant was represented by an insurance company. This fact, if it was a fact, was not induced by plaintiff's counsel but by a question asked upon cross-examination by defendant's attorney. On cross-examination the plaintiff had indicated that he did not remember having talked with any one in September about the accident, and upon defendant's attorney suggesting that a Mr. Donevan had called at plaintiff's house and talked to him about the accident, plaintiff recalled the incident by saying, "Yes, he say he represented an insurance company." On objection this answer was stricken. It is apparent that there was no intention on the part of plaintiff to refer to any insurance com-

pany; it was only an effort on his part to identify the man to whom defendant's counsel referred. The cases cited by counsel were cases where it was apparent that plaintiff's attorney intentionally brought to the attention of the jury the fact that an insurance company was interested in the litigation.

Objection is made to the refusal of the court to give to the jury certain instructions tendered by the defendant. The record does not show that it contains all of the instructions given, although unfortunately defendant's counsel in his abstract has made the record so read. However, the instructions complained of were properly refused. The first assumes that the invitation of the Sprinkler company to plaintiff to do the work was not the invitation of the defendant. Plaintiff was the express invitee of the Sprinkler company and the implied invitee of the defendant. The second refused instruction was an incorrect statement of the law as to what constituted a licensee. Complaint is made of remarks of the trial court, but these are not of sufficient importance to justify a reversal.

We cannot say that the verdict was clearly against the weight of the evidence, and as there were no prejudicial errors upon the trial the judgment is affirmed.

AFFIRMED.

Wetchett, P. J., and O'Connor, J., concur.

... it was only an effort on his part to identify the man to
... whom defendant's counsel referred. The names cited by counsel
... were names where it was apparent that plaintiff's attorney inten-
... tionally brought to the attention of the jury the fact that an
... insurance company was interested in the litigation.

Objection is made to the refusal of the court to
... give to the jury certain instructions tendered by the defendant.
... The record does not show that it contains all of the instructions
... given, although defendant's counsel in his statement
... has said the record so reads. However, the instructions con-
... sidered of were properly returned. The first assumes that the
... invitation of the Springfield company to plaintiff to do the work
... was not the invitation of the defendant. Plaintiff was the express
... invitee of the Springfield company and the invited invitee of the
... defendant. The second refused instruction was an incorrect state-
... ment of the law as to what constituted a licensee. Complaining in
... name of members of the trial court, but there are not of sufficient
... importance to justify a reversal.

We cannot say that the verdict was clearly against the
... weight of the evidence, and as there were no prejudicial errors
... upon the trial the judgment is affirmed.

APRIL 10, 1911

Witness, J. L. and J. C. ...

L. A. ANDREW, Superintendent of
Banking of the State of Iowa,
as Receiver of Iowa Loan & Trust
Company, a Corporation,
Appellee,

vs.

CHARLES E. CLELAND et al.

On Appeal of MYRTLE CLELAND,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal Myrtle Cleland seeks the reversal of a decree ordering that two pieces of real estate, to which she holds the legal title, should be subjected to a judgment against her husband, Charles E. Cleland.

This is a creditor's bill filed on behalf of the Iowa Loan & Trust Company, a corporation, which during the pendency of this suit became insolvent, and the Superintendent of Banking of the State of Iowa, as Receiver, was substituted as complainant. The bill alleged that a judgment was obtained by the Loan and Trust company in the Municipal court of Chicago December 15, 1919, against C. E. Cleland for \$9300. The supplemental bill alleged that two parcels of real estate, one known as No. 3051 North Sheffield avenue and the other as No. 6303 North Fairfield avenue, both in Chicago, Illinois, belonged to C. E. Cleland; that Myrtle Cleland, his wife, who held title, had no interest in the same, as the funds used to purchase same were the funds of C. E. Cleland. The cause was not referred to a master in chancery, but was tried by the court. A decree was entered, finding that Myrtle Cleland held title to No. 3051 North Sheffield avenue and to an undivided one-half interest in No. 6303 North Fairfield avenue, in trust for her husband, and that the titles were taken in the name of Myrtle Cleland with the intent to defraud. hinder

J. A. ARNOLD, Defendant
vs.
JAMES E. CLARK and
as Receiver of Iowa Loan & Trust
Company, a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

JAMES E. CLARK and
as Receiver of Iowa Loan & Trust
Company, a Corporation,
Appellee.

THE COURT'S OPINION OF THE COURT.

It is well known that the purpose of a
decree is to settle the title to real estate, to which the parties
the legal title, should be subjected to a judgment against the
land, Charles E. Clark and
This is a creditor's bill filed on behalf of the
Iowa Loan & Trust Company, a corporation, which, until the
tenancy of this bill became inactive, and the corporation was a com-
pany of the State of Iowa, at Rockford, was substituted as com-
plainant. The bill alleged that a judgment was obtained by the
Iowa Loan & Trust Company in the Municipal Court of Chicago, Illinois,
to wit, against J. A. Arnold for \$8000. The unpaid bill
alleged that two parcels of real estate, one known as No. 1001
North Sheffield Avenue and the other as No. 1003 North Sheffield
Avenue, both in the City of Chicago, Illinois, belonged to J. A. Arnold; that
Myrtle Clark, his wife, who held title, had no interest in the
same, as the funds used to purchase same were the funds of J. A.
Clark. The cause was not referred to a master in chancery,
but was tried by the court. A decree was entered, finding that
Myrtle Clark was the owner of the premises, and that the title to the same
was in her name, and that the title to the same was in her name.

and delay the judgment creditor of Charles E. Cleland in collecting its judgment.

No facts or reasons are given in the decree to support its conclusions, so that this court has not had the benefit of findings of any evidentiary facts either by a master or the chancellor. This has made it difficult for us, in view of the conflicting claims and the great number of items involved, including over one hundred exhibits, to determine the facts upon which to base a conclusion. After examining the record, we hold that the evidence did not justify the chancellor in his findings and that the decree should be reversed with directions to dismiss the bill for want of equity.

We can only outline our reasons for this conclusion, and shall not refer to a large number of matters in the record. About 1917 C. E. Cleland and Myrtle Cleland, his wife, came to Chicago from Des Moines, Iowa, where C. E. Cleland had gone through bankruptcy. He had no money or property of any kind at this time. He became employed on a commission basis by the Broadway Motor Sales Company. The money thus earned by C. E. Cleland was deposited in a commercial or checking account with the Fidelity Trust & Savings Bank in the name of "E. Cleland by C. E. Cleland." Both C. E. Cleland and his wife testified that all of this money was used for household expenses of themselves and their little daughter. Both testify positively that none of the money given by the husband to his wife for household expenses ever went for the purchase of the real estate in question. There is evidence that it cost the family over \$300 a month for living expenses, aside from some unusual hospital and doctors' bills to the amount of approximately \$2,000, occasioned by the serious illness of Mr. and Mrs. Cleland and their little daughter. Mrs. Cleland testified that this money received from C. E. Cleland was not quite enough to maintain the household expenses and the deficiency was

and being the first man credited of Charles D. O'Connell in collecting
the same.
The facts are as follows: The record in the books of the
bank is correct, so that this court has not had the benefit
of any other evidence, either by a master or the
bank. This has made it difficult for us in view of the
conflicting claims and the great number of items involved, in
finding over one hundred exhibits, to determine the facts upon
which to base a conclusion. After examining the record, we hold
that the evidence did not justify the chancellor in his findings
and that the decree should be reversed with directions to dismiss
the bill for want of equity.
We can only outline our reasons for this conclusion,
but will not refer to a large number of matters in the record.
In 1914 C. D. O'Connell and Myrtle O'Connell, his wife, came to
Boston from Providence, Rhode Island, where C. D. O'Connell had gone through
bankruptcy. He had no money or property of any kind at this time.
He was then employed as a messenger with the Telephone
Company. The money was earned by C. D. O'Connell was de-
posited in a commercial or checking account with the Fidelity
Trust & Savings Bank in the name of "M. O'Connell by C. D. O'Connell."
Both C. D. O'Connell and his wife testified that all of this money
was used for household expenses of themselves and their five
daughters. Their testify positively that none of the money given
by the husband to his wife for household expenses ever went for
the purchase of the real estate in question. There is evidence
that it cost the family over \$2000 a month for living expenses,
which was more than usual for a family of that size at the
time. The evidence is also that the family was living in a
house of approximately \$2,000, purchased by the husband's father
at 100, and that O'Connell and his wife lived there. They O'Connell
testified that this money was used for the household expenses of the family.

made up by her out of her individual earnings. The aggregate of C. E. Cleland's income for the years 1919 to and including the first six months of 1924 was something over \$19,000. The total living expenses, including doctors' and hospital bills for the same period of time roughly were over \$21,000, which would indicate that C. E. Cleland's income during this time was short about \$2,000 of covering the entire living expenses.

There is abundance of evidence that Myrtle Cleland herself was an active business woman in a small way. She bought and sold household goods, sewing machines, victrolas, rugs, also furnished apartments, leaseholds and real estate. For a time she ran a rooming house and kept roomers, doing all the work herself; also for a time she worked at Marshall Field & Company. Her total income from these various pursuits, covering the period from 1918 to the latter part of 1924, inclusive, was approximately \$9,000. These facts point, at least, to the conclusion that it was highly probable that any investments in real estate would be made out of moneys earned by Myrtle Cleland, who would be the only one of the family in possession of funds for investments.

On July 31, 1920, Myrtle Cleland opened a savings account with the Fidelity Trust & Savings Bank, in which she made a deposit of \$1,000. This is called "savings account No. 1703." She testified that this deposit was the result of her savings from her wages while working for Marshall Field & Company and from the sale of some Liberty Bonds. Complainant attempts to make a great deal of the fact that when this account was opened it was in the name of "M. Cleland per C. E. Cleland," with the signature of C. E. Cleland only; ^{says} that this was merely a blind to cover the fact that the moneys deposited therein belonged to C. E. Cleland. The explanation of the manner in which this account was opened is that C. E. Cleland, his wife and her sister went to the bank to open a

made up of her own individual earnings. The statement of C. E. Ireland's income for the years 1919 to and including the first six months of 1920 was something over \$12,000. The total income, including doctor's and hospital bills for the same period of time roughly were over \$21,000, which would indicate that C. E. Ireland's income during this time was about \$9,000 of covering the entire living expenses.

There is abundance of evidence that Myrtle Ireland herself was an active business woman in a small way. She herself had a small grocery store, and was also a part owner of a small restaurant. She was also for a time she worked at Marshall Field & Company. Her total income from these various pursuits, covering the period from 1919 to the first six months of 1920, was something over \$12,000. It is also stated that Myrtle Ireland, who would be the only one of the family in possession of funds for investments.

On July 21, 1920, Myrtle Ireland opened a savings account with the Fidelity Trust & Savings Bank, in which she made a deposit of \$1,000. This is called "savings account no. 1705." It is testified that this deposit was the result of her savings from her wages while working for Marshall Field & Company and from the sale of some Liberty bonds. Her attempt to make a great deal of the fact that when this account was opened it was in the name of "Myrtle Ireland per C. E. Ireland," with the signature of C. E. Ireland, and that this was merely a ploy to cover the fact that the money deposited therein belonged to C. E. Ireland. The explanation of the manner in which this account was opened is that C. E. Ireland, his wife and her sister went to the bank to open a

savings account for Mrs. Cleland; that there was a crowd at the bank and some accident outside of the bank diverted the attention of the two women and that Cleland then made the deposit and opened the account, signing as indicated, but with the understanding that Mrs. Cleland should subsequently leave her own signature, which she did and a new signature card was given signed, "Myrtle Cleland" alone. This was prior to any withdrawals. Withdrawal checks from this account are in evidence, all bearing the signature of Myrtle Cleland only.

The record shows that the purchase of No. 3051 North Sheffield avenue was made by a cash withdrawal of \$2600 from savings account No. 1703 on September 4, 1923. Before this withdrawal was made, there was a balance in this account of nearly \$3700. There is no evidence whatever that any part of this was made up from any funds belonging to C. B. Cleland. On the contrary the record shows that on May 1, 1923, Myrtle Cleland and a Mrs. Trase bought certain property on Pensacola avenue, Mrs. Cleland withdrawing her one-half share of the cash payment from savings account No. 1703. This property was sold in August, 1923, at a profit, the sellers receiving in cash, after deducting expenses, \$5589.10. One-half of this belonged to Mrs. Cleland, which she deposited in two deposits, - August 14, \$194.55, and August 15, \$2600. This made the balance to her credit in account No. 1703 on the latter date approximately \$3700. On September 4th she withdrew the \$2600 item and used it on account of the cash payment required for the purchase of No. 3051 Sheffield avenue; the balance was secured by mortgage.

A real estate agent, who conducted this sale, testified that this property was bought and paid for by Mrs. Cleland and that from the cash received from her he paid one of the prior mortgages. The note for the balance of the purchase price was signed by Myrtle Cleland only, the agent testifying that, as she owned the property, her signature alone was sufficient; that he did not talk to Mr.

savings account for Mrs. Cleland; that there was a group of the bank and some accident outside of the bank it voided the attention of the two women and that Cleland then made the deposit and opened the account, signing as indicated, but with the understanding that Mrs. Cleland should subsequently leave her own signature, which she did and a new signature card was given signed, "Myrtle Cleland". This was prior to any withdrawals. Withdrawal checks from this account are in evidence, all bearing the signature of Myrtle Cleland only.

The record shows that the purchase of No. 3001 North Mainland Avenue was made by a cash withdrawal of \$2800 from savings account No. 1703 on September 4, 1932. Before this withdrawal was made, there was a balance in this account of nearly \$2700. There is no evidence whatever that any part of this was made up from any funds belonging to C. B. Cleland. On the contrary the record shows that on May 1, 1932, Myrtle Cleland and a Mrs. Wiese bought certain property on Pennsylvania Avenue, Mrs. Cleland withdrawing her one-half share of the cash payment from savings account No. 1703. This property was sold in August, 1932, at a profit, the balance received in cash, after deducting expenses, \$5589.10. One-half of this belonged to Mrs. Cleland, which she deposited in two deposits, August 14, \$1344.52, and August 15, \$2244.58. This made the balance to her credit in account No. 1703 on the latter date approximately \$2700. On September 4th she withdrew the \$2800 loan and used it on account of the cash payment required for the purchase of No. 3001 Mainland Avenue; the balance was secured by mortgage.

A real estate agent, who conducted this sale, testified that this property was bought and sold for by Mrs. Cleland and that from the cash received from her he paid one of the prior mortgages. The note for the balance of the purchase price was signed by Myrtle Cleland only, the agent testifying that, as she owned the property, only she alone was entitled; that he did not talk to Mr.

Cleland about the notes. This evidence should have justified a finding that the property at No. 3051 North Sheffield avenue belonged to Myrtle Cleland alone and that C. B. Cleland had no interest therein.

As to the property at No. 6303 Fairfield avenue, we find that October 20, 1923, Mrs. Cleland and Mrs. Wrase, who had been in a number of joint deals in real estate, purchased certain property on North Marshfield avenue, each owning a one-half interest. This was sold and Mrs. Cleland's share of the profits was \$1,000. In July, 1924, Mrs. Cleland and Mrs. Wrase purchased in equal shares the Fairfield avenue property. Mrs. Cleland's share of the cash payment on this latter property was \$600, which came from the profits on the Marshfield avenue deal.

A lawyer practicing in Chicago testified that he represented Mrs. Cleland in her real estate transactions; that in all of them Mrs. Cleland told him what she wanted him to take care of; that she came to his office bringing the necessary papers; that he always had the transactions with her; that she paid him for his services either by her own check or in cash; that "she asked me to represent her and I was under her direction."

There is no controversy over the legal principles involved. Fraud must be proved by clear and convincing evidence. Carter v. Carter, 283 Ill. 324. The evidence to prove a resulting or constructive trust must be strong, clear and unequivocal. Greer v. Farmers State Bank, 286 Ill. 454. Fraud cannot be based on conjecture. Hosbarger v. Brown, 313 Ill. 238. While the relationship of husband and wife is a circumstance which may excite suspicion, it will not of itself amount to proof of fraud and does not change the rule as to the burden of proof. American Hoist & Derrick Co. v. Hall, 208 Ill. 597. Even if we apply to the instant case the somewhat severe rule that a wife must produce affirmative evidence

On or about May 1968, the defendant was advised by the witness that the property of No. 3034 North Sheffield Avenue belonged to Willie Cleveland and that J. E. Cleveland had no interest in it.

first that October 30, 1933, Mrs. Cleland and Mrs. Wynn, who had been in a number of joint deals in real estate, purchased certain property on North Marshall Avenue, each owning a one-half interest. This was sold and Mrs. Cleland's share of the profit was \$1,000. In July, 1934, Mrs. Cleland and Mrs. Wynn purchased in several shares the Marshall Avenue property. Mrs. Cleland's share of the profit was \$1,000.00. Mrs. Wynn's share was \$1,000.00.

A lawyer practicing in Chicago testified that he never
recalled the claim in her real estate transactions; that in all
of those years, KIMBLE told him what was wanted and he took care of
that and there is no other person in the household known; that
he always had the correspondence with her and that was all the
contact either of him with her or in return; that was all the
contact was and I have nothing else to say.

There is no controversy over the legal principles in

to show that real estate standing in the name of the husband was purchased by the wife with money which she owned separate and apart from her husband, (Bennett v. Beahold, 123 Ill. App. 311) yet we are of the opinion that the record contains an abundance of evidence to prove affirmatively that the two pieces of real estate in question were purchased by Myrtle Cleland with her own money which she owned separate and apart from her husband and that the title, both legal and equitable, properly was in her.

It would unduly lengthen this opinion to cover completely all of the facts appearing in evidence. We have briefly indicated our reasons for concluding that the decree must be reversed and the cause remanded with directions to dismiss complainant's bill and supplemental bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and O'Connor, J., concur.

to show that real estate standing in the name of the husband was
transferred by the wife to her husband and that the husband
from her husband. Transferred to her husband, the wife
of the opinion that the record contains an abundance of evidence to
prove affirmatively that the two pieces of real estate in question
were purchased by Myrtle Glendon with her own money which she owned
separate and apart from her husband and that the title, both legal
and equitable, properly was in her.

It would unduly lengthen this opinion to cover com-
pletely all of the facts appearing in evidence. We have briefly
indicated our reasons for concluding that the decree must be re-
versed and the cause remanded with directions to the trial court
and a bill and supplemental bill for want of equity.

REVEREND AND HONORABLE WITH DIRECTOR.

Respectfully,
J. J. [Signature]

MUTUAL CUTLERY CO., a
Corporation,

Appellee,

vs.

AMERICAN EXPRESS COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it for \$1005 entered upon a verdict.

Plaintiff in its statement of claim asserted that it paid the defendant on January 28, 1922, \$1,000, to be forwarded with a list of merchandise to Germany, and \$30 for a cablegram; that defendant agreed to forward the money in the form of 200,000 marks by cablegram but failed to do so, sending it by mail, by reason whereof said money was delayed and held back in Germany for a long period of time; that defendant failed to reconvert said American money promptly into marks and failed to return said money to plaintiff when said order was not filled immediately; that defendant did not offer to return said money to plaintiff until the end of May, 1922, when said 200,000 marks had become valueless; that the defendant knew that the value of the marks was fluctuating and it was defendant's duty immediately to dispatch the money by cablegram, but by failing to do so for a period of about five months, the marks had depreciated and become valueless.

Defendant's amended affidavit of merits denied that it received any sum of money to be forwarded by cablegram or that it was its duty to return the money within a reasonable time if the order was not filled within a reasonable time; denied that said 200,000 marks became valueless at the end of May, 1922, or

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AMERICAN EXPRESS COMPANY
CHICAGO, ILL.
JANUARY 25, 1933

OF CHICAGO.

MR. JENNISON MCKENNEY WILL REPLY THE OPINION OF THE COURT.

Defendant appears from a judgment against it for

\$1000 entered upon a verdict.

Plaintiff in its statement of claim asserted that

it paid the amount on January 25, 1933, \$1,000, to be forwarded

on a list of merchandise to Germany, and \$50 for a consignment;

that defendant agreed to forward the money in the form of 200,000

marks by cablegram but failed to do so, sending it by mail, by

which means that money was delayed and held back in Germany

for a long period of time; that defendant failed to recover

said American money promptly into marks and failed to return

said money to plaintiff when said order was not filled immediately;

that defendant did not offer to return said money to plaintiff

until the end of May, 1933, when said 200,000 marks had become

valueless; that the defendant knew that the value of the marks

was fluctuating and it was defendant's duty immediately to dis-

patch the money by cablegram, but by failing to do so for a

period of about five months, the marks had depreciated and be-

come valueless.

Defendant's amended affidavit of merits denied that

it received any sum of money to be forwarded by cablegram or that

it was its duty to return the money within a reasonable time if

order was not filled within a reasonable time; denied that

said 200,000 marks were valueless at the end of May, 1933, or

any time thereafter, or that defendant breached its alleged agreement. Defendant states that the transaction was between the defendant and the Dyfoam Products Company, acting for and on behalf of the plaintiff; that at the request of the Dyfoam Products Company the defendant issued a commercial letter of credit authorizing Herm Schmarsow, Cologne-Ehrenfeld, Germany, to draw on the American Express Company at Hamburg for any sum not exceeding 200,000 marks for an invoice of cutlery to be shipped by Schmarsow to Chicago; that subject to the approval of its New York office, defendant agreed to establish the credit and send the list by cable, but such approval was refused; that it was subsequently mutually agreed between the defendant and the Dyfoam Products Company, acting for the plaintiff, that said credit and the details of the order should not be sent by cable, but by mail; that this was done promptly; that at the request of the plaintiff the defendant from time to time extended said credit until it was made to expire on May 1, 1932; that said credit was available to Schmarsow from the time it was established until May 1, 1932, but Schmarsow did not ship the goods that he was supposed to ship against said credit, and did not draw against the same; that finally on May 5, 1932, plaintiff requested defendant to cancel said credit and return the amount of same to plaintiff; that this was done promptly and defendant offered to return the amount thereof viz. 200,000 marks, but the plaintiff refused to accept the same.

As we have concluded that the verdict is against the weight of the evidence and that there must be another trial, we shall only briefly refer to the evidence. The evidence tends to show that Goldman, president of the plaintiff, did not know anything about foreign exchange and that Joseph E. Cohen, president of the Dyfoam Products Company, went with him to the office of the defendant and conducted the negotiations, representing the plain-

tiff; that plaintiff paid \$1030 for the purpose of establishing with the American Express Company in Germany a credit for 200,000 marks. An application for this was made out and signed by the Dyfoam Products Company by J. M. Cohen, president, in the presence of Goldman, who acquiesced in everything that Cohen did. A list of merchandise consisting of from 300 to 350 numbers was submitted to be incorporated in the cablegram, and Doesburg, who is the general manager of the foreign exchange department in Chicago of the defendant, informed them that on account of the great number of figures in the list and the chance of mistakes being made by the Cable company, he doubted if the New York office of defendant would undertake to incorporate said numbers in the cable, but that he would find out and let them know later. A receipt was issued by defendant, acknowledging the receipt from plaintiff of \$1030, "For 200000 Mark Cable." Later Doesburg, after receiving instructions from the defendant's New York office, informed Cohen that defendant would incorporate said list in the cablegram if plaintiff would pay \$10 for coding the same and the price of the cablegram; that Cohen instructed the defendant to incorporate the list if it could be done for \$10 for coding and not to exceed \$30 for the cablegram, but that if it could not be done for that price, then to forward the list and establish the credit by mail and to extend the expiration date to March 31. It was ascertained that it could not be cabled for that price. Doesburg so informed Cohen, who then instructed the defendant to send the same by mail, which was done on February 3, 1923, and Cohen was so informed. February 14th Cohen, acting for the plaintiff, telephoned defendant to allow an increase of 10% in the value of the merchandise. This was confirmed by letter from Cohen. March 3rd Cohen telephoned Doesburg that he had received a letter from Schmarsow in Germany saying that there was a strike on the railroads ^{there} and it was im-

with the American Express Company in Germany a credit for \$20,000.00. An application for this was made out and signed by the German Produce Company by J. D. Cohen, president, in the presence of Solomon, who accompanied in everything that Cohen did. A list of merchandise consisting of from 200 to 250 numbers was submitted to be incorporated in the caption, and Hamburg, who is the general manager of the foreign exchange department in Chicago of the defendant, informed them that on account of the great number of figures in the list and the chance of mistakes being made by the Cable company, he doubted if the New York office of defendant would undertake to incorporate with _____ in the cable, but that he would find out and let them know later. A receipt was issued by defendant, acknowledging the receipt from plaintiff of \$100.00 "for 200000 Mark Cable." Later Hamburg, after receiving information from the defendant's New York office, informed Cohen that defendant would incorporate said list in the caption if plaintiff would pay \$10 for coding the same and the price of the cable group that Cohen instructed the defendant to incorporate the list it could be done for \$10 for coding and not to exceed \$20 for the caption, but that it could not be done for that price, then to forward the list and establish the credit by mail and to extend the expiration date to March 31. It was ascertained that it could not be coded for that price, Hamburg so informed Cohen, who then instructed the defendant to send the same by mail, which was done on February 1, 1928, and Cohen was so informed. February 1928 Cohen, acting for the plaintiff, telephoned defendant to allow an increase of 10% in the value of the merchandise. This was confirmed by letter from Cohen. Later the Cohen telephoned defendant that he had received a letter from defendant in Germany stating that there was a strike on the railways and it was im-

possible for said merchant to ship the goods. Cohen instructed the defendant to extend the expiration date of the credit to May 1, 1922, so as to allow the shipper in Germany all the time necessary to make the shipment. Defendant followed these instructions. April 6, 1922, Cohen telephoned to Doesburg, instructing that the credit be cancelled, but upon Doesburg saying that the expiration date had only three weeks to run and that the merchant in Germany ought to be given a chance to make the shipment, Cohen said to let the credit remain extended to May 1. Subsequently Doesburg informed Cohen that defendant's Hamburg agent had written defendant that no shipments had been made under said credit. Doesburg said that defendant was ready to refund the amount due and inquired how plaintiff wished this refund to be made, in marks or in American money. Cohen said he would let him know, and on June 23rd he informed Doesburg that plaintiff wanted the refund made in 200,000 marks. Defendant made out a check for 200,000 marks and tendered it to Cohen, who refused it and asked that it be given to Goldman, president of the plaintiff. It was tendered to Goldman, who refused to accept the 200,000 marks and demanded \$1030 in American money "or nothing."

Goldman takes the position that Cohen was not authorized to represent him, but a fair view of the evidence leads to the contrary conclusion. It is admitted that Cohen signed the application on behalf of the plaintiff. There is not a particle of evidence that Cohen was acting on behalf of himself or the Dyfoss Products Company. Goldman testified that he knew nothing about foreign exchange and admits that he told defendant that he would give the list of merchandise to Cohen and that Cohen was plaintiff's agent to submit the list of merchandise to the Express company. Goldman says that he was on the road constantly and could not be in the city and therefore had Cohen act for him; that he authorized Cohen to try to get the money back from the defendant; that he knows that Cohen

...for this purpose for this purpose. Cohen instructed the
defendant to extend the expiration date of the credit to May 1, 1933,
so as to allow the shipper in Germany all the time necessary to make
the shipment. Defendant followed these instructions. April 8, 1933,
Cohen telephoned to Rosenberg, instructing that the credit be con-
firmed, but when Rosenberg asked that the expiration date be only
three weeks to run and that the merchant in Germany ought to be
given a chance to make the shipment, Cohen said to let the credit
remain unchanged to May 1. Subsequently Rosenberg informed Cohen that
defendant's Hamburg agent had written defendant that no shipment
had been made under said credit. Rosenberg said that defendant was
ready to refund the amount due and indicated how plaintiff wished this
refund to be made, in notes or in American money. Cohen said he
would do this. ...
plaintiff wanted the refund made in 300,000 marks. Defendant made
a check for 300,000 marks and tendered it to Cohen, who refused
it and asked that it be given to Goldman, president of the firm.
... to the plaintiff is ...
...
Goldman takes the position that Cohen was not authorized
to represent him, but a fair view of the evidence leads to the con-
trary conclusion. It is admitted that Cohen signed the application
on behalf of the plaintiff. There is not a particle of evidence that
Cohen was acting on behalf of himself or the Dyl and Frohne Company.
Goldman testified that he knew nothing about foreign exchange and
admits that he told them that he would give the list of mer-
chandise to Cohen and that Cohen was plaintiff's agent to submit
the list of merchandise to the express company. Goldman says that
he was on the road constantly and could not be in the city and

wrote some letters and that Mr. Goldman, read some of them; that Cohen had to give instructions to order the goods and that he might have had the date of credit extended at different times, but Goldman did not know; that the only time Goldman talked to anyone connected with defendant was when he asked them about the goods coming over.

The preponderance of the evidence shows that Cohen was acting as the authorized agent of plaintiff in the transaction and that the money was sent by mail instead of by cable on account of the expense with the consent of plaintiff acting through Cohen. The evidence failed to support the allegations of plaintiff's statement of claim that defendant agreed to cable the credit.

The court improperly permitted evidence as to the value of German marks on January 23, 1923. By the receipt and application for credit, defendant agreed to establish credit in Germany for 200,000 marks for the price paid - \$1030. The actual value of the marks on that date was immaterial. The testimony as to the value of marks on other dates was incompetent, as this testimony was based on wholesale rates and rates that apply only to banks. The marks in question were purchased at retail and were not purchased by a bank.

When Boesburg asked Cohen whether the refund should be made in marks or dollars, Cohen said they wanted marks. Goldman admitted that Cohen was plaintiff's agent to get back this refund from the defendant.

If plaintiff ordered defendant to return marks, it is immaterial what the rate of exchange might be. Defendant cannot be held reasonable for the fluctuating values of German marks; that risk was assumed by plaintiff. Plaintiff was entitled to a refund of 200,000 marks or its equivalent in United States money as of the time defendant made its tender of marks to plaintiff.

Inspection of the record leads to the conclusion that, while not flagrant, the conduct of plaintiff's counsel during the trial tended to create prejudice against the defendant. After a

... was some 100,000 and that Mr. Goldman, head of the ...
... had to give instructions to order the goods and that he ...
... had the date of credit extended at different times, but ...
... did not know; that the only time Goldman failed to ...
... with Goldman was when he asked them about the ...
... The ... of the evidence shows that Cohen was ...
... acting as the authorized agent of plaintiff in the transaction and ...
... that the money was sent by mail instead of by cable on account of ...
... the expense with the consent of plaintiff acting through Cohen. The ...
... evidence failed to support the allegations of plaintiff's statement ...
... at which time defendant agreed to cable the credit.
... The court improperly excluded evidence as to the value ...
... of German marks on January 23, 1923. By the case of ... application ...
... for credit, defendant agreed to establish credit in Germany for ...
... 200,000 marks for the price paid - \$100,000. The actual value of the ...
... mark on that date was immaterial. The testimony as to the value ...
... of marks on other dates was immaterial, as this testimony was based ...
... on wholesale rates and rates that apply only to banks. The ratio ...
... in question was purchased at retail and were not purchased by a bank ...
... When defendant asked Cohen whether the ... should be ...
... made in marks or dollars, Cohen said they wanted marks. Defendant ...
... stated that Cohen was plaintiff's agent to get back this ... from ...
... the defendant.
... If plaintiff ordered defendant to return marks, it is ...
... immaterial what the rate of exchange might be. Defendant cannot be ...
... held responsible for the fluctuating value of German marks; that ...
... mark was ordered by plaintiff. Plaintiff was entitled to a refund ...
... of 200,000 marks or its equivalent in United States money as of the ...
... time defendant made the order for all marks to plaintiff.
... Inspection of the record leads to the conclusion that ...
... plaintiff's ...

witness for the defendant had testified, plaintiff's counsel said, "Have you finished your speech?" And again counsel said in the presence of the jury, "We will take from the Express company right now the value of those marks, notwithstanding the statement of the attorney to the jury, whatever they were worth at the time the contract was rightfully cancelled. They have not even paid us our thirty dollars cable money." Improper remarks of counsel, which tend to create prejudice, will work a reversal. Paulsen v. Carey Brewing Co., 220 Ill. App. 273.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and O'Connor, J., concur.

...the defendant had testified, Plaintiff's counsel said.

"Have you finished your speech?" and again counsel said in the

presence of the jury, "We will take from the witness company right

now the value of these marks, notwithstanding the testimony of the

attorney to the jury, whatever they were worth at the time the

conviction was rightfully annulled. They have not even paid us but

thirty dollars cash money." Improper remarks of counsel, which

lead to create prejudice, will work a reversal.

...the court, 220 Ill. App. 273.

For the reasons above indicated the judgment is reversed

and the cause remanded.

REVEREND AND HONORABLE

OF THE COURT

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VASILIOS HARITOS (Complainant Below).
LILLIAN HARITOS et al., (Defendants Below).

VASILIOS HARITOS,
Appellant,

vs.

GOTTLIEB MEINERT et al.,
Appellees.

VASILIOS HARITOS (Complainant Below),
LILLIAN HARITOS et al. (Defendants Below).

HERBERT HARITOS et al.,
Appellants,

vs.

GOTTLIEB MEINERT et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Vasilios Haritos filed his bill alleging that on June 1, 1920, defendant, Gottlieb Meinert, was the equitable owner of premises known as No. 3101 West Congress street, Chicago; that legal title was in his daughter, Lillian Meinert, in trust for her father; that complainant was then engaged to marry said Lillian Meinert; that Gottlieb Meinert made a verbal offer to sell said premises to complainant; which offer complainant accepted; that complainant entered into and took possession of the premises and commenced to make permanent and valuable improvements thereon; that on July 28, 1920, he married Lillian Meinert and they commenced to reside in one of the flats on the premises; that subsequently Lillian Haritos abandoned the complainant, taking with her their minor child; that complainant has sought an accounting with Gottlieb Meinert to ascertain how much is due on said premises, but Meinert refuses to give a statement of account and refuses to carry out the contract of sale. Complainant asks that Gottlieb Meinert

VASILIOS HARTIS (Complainant Below)
LILLIAN HARTIS et al. (Defendants Below)

VASILIOS HARTIS
Appellant

GOTTIEB WEINERT et al.
Appellees

VASILIOS HARTIS (Complainant Below)
LILLIAN HARTIS et al. (Defendants Below)

HERBERT HARTIS et al.
Appellees

GOTTIEB WEINERT et al.
Appellees

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McDERMOTT DELIVERED THE OPINION OF THE COURT.

Vasilios Hartis filed his bill alleging that on June 1, 1920, defendant, Gottlieb Weinert, was the equitable owner of premises known as No. 3101 West Congress street, Chicago; that legal title was in his daughter, Lillian Weinert, in trust for her father; that complainant was then engaged to marry said Lillian Weinert; that Gottlieb Weinert made a verbal offer to sell said premises to complainant; which offer complainant accepted; that complainant entered into and took possession of the premises and commenced to make permanent and valuable improvements thereon; that on July 28, 1920, he married Lillian Weinert and they commenced to reside in one of the flats on the premises; that subsequently Lillian Hartis abandoned the complainant, taking with her their minor child; that complainant has sought an accounting with Gottlieb Weinert to ascertain how much is due on said premises, but Weinert refuses to give a statement of account and refuses to carry out the contract of sale. Complainant asks that Gottlieb Weinert

and Lillian Haritos make answer to said bill and for an accounting and asks that the oral agreement to sell complainant the property be performed.

Answers were filed by the defendants and cross-bills by them respectively, Gottlieb Meinert's cross-bill alleging that October 10, 1917, he conveyed the premises to Lillian Haritos, subject to an incumbrance of \$4,000, for \$10,000 and retained a vendor's lien to secure the amount of said notes; that \$13,000 is due thereon for which the cross-complainant claimed a vendor's lien on the premises and asks that a decree be entered ordering the premises sold to satisfy the same. Complainant filed an answer to this cross-bill and the cause was referred to a master in chancery.

While the matter was pending before the master and before he had reported, Lillian Haritos died August 28, 1926, leaving her surviving her two minor children. Her death was suggested of record and Albert G. Duncan was appointed guardian ad litem. It was stipulated by all the parties that any and all points that might or could have been raised are to be considered to be made on the appeal by said guardian ad litem without the making of formal objections and exceptions to the report of the master and to the decree.

The master's report found the equities with the cross-complainant, Gottlieb Meinert; that he had a vendor's lien and was entitled to have a decree foreclosing the same and he recommended that the bill of complaint be dismissed for want of equity. Exceptions were filed to the report by the complainant, which were overruled by the chancellor and the report was approved and confirmed and a decree entered accordingly. An appeal has been taken by the complainant and docketed in this court as No. 32387. An appeal also has been taken by the guardian ad litem and docketed in this court as No. 32388. The cases have been consolidated for hearing.

The briefs filed on behalf of complainant, Vasilios Haritos, and on behalf of the guardian ad litem for the minors are

and Lillian Hariton make answer to said bill and for an accounting and asks that the oral agreement to sell comprising the property be performed.

Answers were filed by the defendants and cross-bills by them respectively. Gottlieb Weinert's cross-bill alleging that October 10, 1917, he conveyed the premises to Lillian Hariton, and test to an incumbrance of \$4,000, for \$10,000 and retained a vendor's lien to secure the amount of said notes; that \$18,000 is due thereon for which the cross-complainant claimed a vendor's lien on the premises and asks that a decree be entered ordering the premises sold to satisfy the same. Complainant filed an answer to this cross-bill and was referred to a master in chancery.

While the matter was pending before the master and before he had reported, Lillian Hariton died August 28, 1920, leaving her surviving her two minor children. Her death was suggested of record and Albert G. Dunham was appointed guardian ad litem. It was stipulated by all the parties that any and all points that might or could have been raised are to be considered to be made on the appeal by said guardian ad litem without the making of formal objections and exceptions to the report of the master and to the decree.

The master's report found the equities with the cross-complainant, Gottlieb Weinert; that he had a vendor's lien and was entitled to have a decree for sale of the premises and he recommended that the bill of complaint be dismissed for want of equity. Exceptions were filed to the report by the complainant, which were overruled by the chancellor and the report was approved and confirmed and a decree entered accordingly. An appeal has been taken by the complainant and docketed in this court as No. 32387. An appeal also has been taken by the guardian ad litem and docketed in this court as No. 32388. The cases have been consolidated for hearing. The bills filed on behalf of complainant, Vestal Hariton, and on behalf of the guardian ad litem for the minors are

identical. The two points made in them are, first, that a vendor's lien arises from principles of equity alone and has no foundation or support in the principles of common law or statute. Cowl v. Varnum, 37 Ill. 182; Blomstrom v. Dux, 175 Ill. 435. This may be conceded. The second point is that homestead exemptions and estates under the law of descent and dower are superior to claims or liens except those of a mortgagee. This also may be conceded.

Complainant's brief and the one on behalf of the minor children wholly disregard that portion of Rule 19 of this court which confines the argument to a discussion of the points contained in the brief. The argument is more or less a confusing discussion of the alleged facts.

The master found that on October 10, 1917, Gottlieb Meinert, who owned the premises in question, and his wife, for an alleged consideration of \$10, quit-claimed the same to their daughter Lillian Meinert, then unmarried, subject to two incumbrances, one for \$3500 and the other for \$500; that Lillian Meinert executed a judgment note for \$10,000, payable on or before ten years, to the order of her father and mother, upon the face of which was written:

"It is understood that the Payees are to retain a vendor's lien on the premises at 3101 W. Congress street, Chicago."

March 1, 1918, Lillian Meinert executed her promissory note for \$500, payable on or before ten years, to the order of her parents; and on March 1, 1922, Lillian Haritos, having in the meantime married the complainant, executed her principal promissory note for \$3500, to the order of Gottlieb and Clara Meinert, her parents. Lillian Meinert paid interest on the \$10,000 note from the date of its execution up to about March 1, 1922, when \$1,000 was paid on the principal, after which she paid interest to her father on the balance up to March, 1924. In June, 1920, complainant and his wife and Gottlieb Meinert went to the building in question and Gottlieb introduced the complainant to some of the tenants as

identical. The two points made in them are, first, that a vendor's lien arises from principles of equity alone and has no foundation or support in the principles of common law or statute. Gow v. Varnum, 27 Ill. 182; Hawston v. Dux, 175 Ill. 432. This may be conceded. The second point is that homestead exemptions and estates under the law of descent and tower are superior to claims or liens except those of a mortgagee. This also may be conceded.

Complaintant's brief and the one on behalf of the minor children wholly disregard that portion of Rule 19 of this court which confines the argument to a discussion of the points contained in the brief. The argument is more or less a continuing discussion of the alleged facts.

The master found that on October 10, 1917, Gottlieb Mehnert, who owned the premises in question, and his wife, for an alleged consideration of \$10,000, quit-claimed the same to their daughter Lillian Mehnert, then unmarried, subject to two incumbrances, one for \$3500 and the other for \$200; that Lillian Mehnert executed a judgment note for \$10,000, payable on or before ten years, to the order of her father and mother, upon the face of which was written: "It is understood that the Payee are to retain a vendor's lien on the premises at 3101 W. Congress Street, Chicago."

March 1, 1918, Lillian Mehnert executed her promissory note for \$200, payable on or before ten years, to the order of her parents; and on March 1, 1922, Lillian Mehnert, having in the meantime married the complainant, executed her principal promissory note for \$3500, to the order of Gottlieb and Clara Mehnert, her parents. Lillian Mehnert paid interest on the \$10,000 note from the date of its execution up to about March 1, 1922, when \$1,000 was paid on the principal, after which she paid interest to her father on the balance up to March, 1924. In June, 1920, complainant and his wife and Gottlieb Mehnert went to the building in question and Gottlieb introduced the complainant to some of the tenants and

his prospective son-in-law. Complainant contends that on June 1, 1920, he entered into a verbal contract with Gottlieb Meinert for the purchase of said premises for a consideration of \$10,000; that complainant ordered some electric lighting fixtures for which he paid \$665; that the leases to tenants between April 29, 1921 and April 10, 1924, were signed by the complainant as the lessor; that October 4, 1924, Lillian Haritos for the consideration of ten dollars conveyed and quit-claimed to Gottlieb Meinert the premises in question, and on November 20, 1924, Gottlieb Meinert and his wife, for a consideration of one dollar, quit-claimed the premises to Lillian Haritos; that during the time complainant and his wife occupied the flat from August, 1920, he paid no rent; that Lillian Haritos collected the rent and used the same in payment of bills for the running of the building. The master found that the verbal contract was indefinite as to price, terms of payment, and the date the deed was to issue, and that a court of equity could not enforce the same; that complainant had paid some money for repairs, but that since September 1920, he has been in possession of the flat without paying rent and that the rent greatly exceeded the expenses paid by him. The master found there was due to Gottlieb Meinert a balance of \$9,000 on the \$10,000 note with interest, and also the \$500 note of March 1, 1918, with interest, and also the \$3500 note dated March 1, 1922, with interest, and that the total amount due him was \$15,569, and that Gottlieb Meinert has a vendor's lien for this amount upon the premises.

Complainant in his argument seems to concede that he is not entitled to specific performance of his alleged oral contract and that the defense of the statute of frauds pleaded by Gottlieb Meinert must prevail. The argument now seems to be that complainant's wife Lillian Haritos was vested with title in fee simple to the premises at the time of her death, free from any claim of Gottlieb Meinert,

his prospective son-in-law. Complainant contends that on June 1, 1930, he entered into a verbal contract with Gottlieb Mainert for the purchase of said premises for a consideration of \$10,000; that complainant ordered some electric lighting fixtures for which he paid \$665; that the leases to tenants between April 28, 1931 and April 10, 1934, were signed by the complainant as the lessor; that October 4, 1934, William Haritos for the consideration of ten dollars conveyed and quit-claimed to Gottlieb Mainert the premises in question, and on November 30, 1934, Gottlieb Mainert and his wife, for a consideration of one dollar, quit-claimed the premises to William Haritos; that during the time complainant and his wife occupied the premises from August, 1930, he paid no rent; that William Haritos collected the rent and used the same in payment of bills for the running of the building. The master found that the verbal contract was in definite as to price, terms of payment, and the date the deed was to be made, and that a court of equity could not enforce the same; that complainant had paid some money for repairs, but that since September 1, 1930, he has been in possession of the premises without paying rent and that the rent greatly exceeded the expenses paid by him. The master found there was due to Gottlieb Mainert a balance of \$9,000 on the \$10,000 note with interest, and also the \$600 note of March 1, 1918, with interest, and also the \$3500 note dated March 1, 1932, with interest, and that the total amount due him was \$15,569, and that Gottlieb Mainert has a vendor's lien for this amount upon the premises. Complainant in his argument seems to concede that he is not entitled to specific performance of his alleged oral contract and that the defense of the statute of frauds pleaded by Gottlieb Mainert must prevail. The argument now seems to be that complainant's wife William Haritos was vested with title in fee simple to the premises at the time of her death, free from any claim of Gottlieb Mainert.

and that upon the death of Lillian Haritos the property descended to her husband, the complainant, and her minor heirs. No homestead can be claimed against unpaid purchase money. Bush v. Scott, 76 Ill. 524; Williams v. Jones, 100 Ill. 362. Nor against a vendor's lien. Phelps v. Conover, 25 Ill. 272. The language of the Exemption Act, Section 3, is:

"No property shall, by virtue of this Act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof."

It has also been held that no dower claim can be maintained^{as} against a vendor's lien. Lohmeyer v. Durbin, 206 Ill. 574. The minor heirs and surviving husband take subject to all claims and charges created by Lillian Haritos. Bowen v. Prout, 32 Ill. 354. The minors can claim their rights only from their mother and can take no better estate or interest than she had.

Some argument is made questioning the validity of the notes purporting to have been signed by Lillian Haritos, but she testified before the master that she made the notes and paid interest on them for awhile and then, deciding that she could not keep the building up, she accelerated the time of payment by endorsement on the notes. This testimony is undisputed.

The briefs contain a great deal of superfluous discussion but nothing sufficiently tangible is made to appear to support the criticisms directed against the decree. We find no reason for reversal and the decree is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

and that upon the death of William Harlow the property descended to her husband, the complainant, and her minor heirs. No homestead can be claimed against unpaid purchase money. Gray v. Scott, 111. 324; Williams v. Jones, 100 Ill. 382. Nor against a vendor's lien. Phelps v. Conover, 25 Ill. 276. The language of the Emption Act, Section 3, is:

"No property shall, by virtue of this Act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof."

It has also been held that no dower claim can be maintained against a vendor's lien. Johnson v. Durbin, 206 Ill. 574.

The minor heirs and surviving husband take subject to all claims and charges created by William Harlow. Brown v. Brown, 25 Ill. 354. The minors can claim their rights only from their mother and can take no better estate or interest than she had.

Some argument is made questioning the validity of the notes purporting to have been signed by William Harlow, but she testified before the master that she made the notes and paid interest on them for awhile and then, deciding that she could not keep the building up, she accelerated the time of payment by agreement on the notes. This testimony is undisputed.

The briefs contain a great deal of superfluous discussion but nothing sufficiently tangible is made to appear to support the criticisms directed against the decree. We find no reason for reversal and the decree is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

248 I.A. 637³

VASILIOS HARITOS, (Complainant Below)
LILLIAN HARITOS et al. (Defendants Below)

VASILIOS HARITOS,
Appellant,

vs.

GOTTLIEB WEINERT et al.,
Appellees.

VASILIOS HARITOS (Complainant Below),
LILLIAN HARITOS et al., (Defendants Below).

HERBERT HARITOS et al.,
Appellants,

vs.

GOTTLIEB WEINERT et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the minors referred to in our opinion this day filed in No. 32387, with which this case is consolidated for hearing.

For the reasons appearing in that opinion the decree is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

and that upon the 17th day of

2481A.887

WILLIAM HANITON et al. (Defendants below)

WILLIAM HANITON, Appellant,

WILLIAM HANITON et al., Appellees.

WILLIAM HANITON et al. (Defendants below)

WILLIAM HANITON et al., Appellees.

COURT OF COOK COUNTY, APPEAL FROM CIRCUIT

WILLIAM HANITON et al., Appellees.

MR. JUSTICE BREWER delivered the opinion of the court.

It is so ordered by the court that the writs be granted as prayed for in the

petition filed in No. 28887, with which this case is

consolidated for hearing.

For the reasons appearing in that opinion the decree

is affirmed.

WILLIAM HANITON, Appellant.

Witness my hand and seal of office, this 17th day of

JOHN W. TALBOT,
Appellant,

vs.

CHICAGO ROLLER SKATE COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendant, seeking to recover \$3550 which he claimed was due him under the terms of a written contract entered into between the parties. To the declaration the defendant filed the general issue and two special pleas and an affidavit of merits, which set up three defenses in three separate paragraphs. Plaintiff filed a similiter to the plea of the general issue and a demurrer to the two special pleas. He also made a motion to strike the defendant's affidavit of merits. Plaintiff's demurrer was over-ruled, his motion to strike the affidavit of merits was sustained to the first two paragraphs of the affidavit of merits but over-ruled as to the third. Plaintiff elected to stand by his demurrer and motion to strike. The court then entered judgment in favor of plaintiff for \$169.50, being the sum the defendant in its pleas and affidavit of merits admitted was due plaintiff; it is to reverse this judgment that plaintiff appeals.

In his declaration plaintiff alleges that on September 1, 1921, he entered into a written contract with the defendant whereby the latter was licensed to manufacture and vend certain improvements covered by Letters Patent issued to plaintiff by the United States Government, bearing date November 27, 1917; that the Letters Patent were for a period of seventeen years, covering certain improvements in the composition for wheels to be used in the manufacture of skates and the like. Plaintiff further sets up that he was the owner of certain equipment for the manufacture of fiber and

APPEAL FROM CIRCUIT COURT
OF YORK COUNTY.

APPEAL
FROM
CIRCUIT COURT.

MR. JUSTICE O'CONNOR WILL READ THE OPINION OF THE COURT.

Defendant's motion to reverse is based upon the fact that under the terms of a written contract entered into between the parties, to the best of their knowledge and belief, the defendant was to be paid for the work done by him and an affidavit of service, which set up three defenses in three separate paragraphs. Plaintiff filed a similar affidavit to the effect of the general issue and a demurrer to the two paragraphs. Plaintiff also made a motion to strike the defendant's affidavit of service, which was overruled, also motion to strike the affidavit of service was sustained so that two paragraphs of the affidavit of service were overruled as to the third. Plaintiff's motion to stand by his demurrer and motion to strike the two paragraphs that were in favor of plaintiff for \$100.00, being the sum the defendant in his plea and affidavit of service admitted was the plaintiff; it is to reverse that judgment that plaintiff appeals.

In his declaration plaintiff alleges that on September 1, 1901, he entered into a written contract with the defendant whereby the latter was to furnish to plaintiff a certain number of machines covered by Letters Patent issued to plaintiff by the United States Government, bearing date November 27, 1917; that the machines were for a period of seven years, covering certain improvements in the composition for wheels to be used in the manufacture of shoes and the like. Plaintiff further sets up that he was the owner of certain equipment for the manufacture of shoes and

composition skate wheels and truck rollers; that the defendant was engaged in the business of manufacturing roller skates and desired to manufacture and use roller wheels and truck rollers which were covered by plaintiff's Letters Patent; that thereupon the parties entered into a written agreement which is set forth verbatim in the declaration. By the terms of the contract the parties agreed as follows: Plaintiff licenses the defendant to manufacture and sell roller skate wheels and truck rollers under plaintiff's Letters Patent "during the term thereof ~~and~~ further agrees to oversee and supervise, so far as he is able, the manufacture of skate wheels and truck rollers manufactured by the second party" (defendant.) Then follows a provision that requires plaintiff to turn over his equipment to the defendant. The contract then contains other paragraphs, the meaning of two of them being in controversy; they are as follows:

"Three: In consideration of said license and the conveyance of said equipment of the first party, the second party agrees to pay to the first party twenty-five (25%) per cent of the net profits received by said second party on all skate wheels manufactured by the second party during the life of this agreement, and twenty-five (25%) per cent of the net profits received by said second party on all truck rollers manufactured by said second party during the life of this agreement.

"Five: Party of the second part agrees to make an annual settlement with party of the first part as to the profits arising from sales during the year prior to settlement. Date of such settlement shall be as near after May 1st as is possible. This date being inventory. And further agrees to advance to party of the first part two hundred (\$200.00) dollars a month on account to apply against such future profits."

Plaintiff further alleges in his declaration that he turned over his equipment as provided in the contract and performed the other duties required of him by the contract; that the defendant took possession of the equipment and commenced to manufacture the roller skate wheels and the roller trucks under the license from the date of the contract until the beginning of the suit; that the defendant failed to make an annual settlement with plaintiff, as required by the contract, but that it paid plaintiff \$200 a month as mentioned in paragraph 5 of the contract, until he had received

...that the defendant was engaged in the business of manufacturing roller skates and desired to manufacture and use roller skates and track rollers which were covered by plaintiff's Letters Patent; that thereupon the parties entered into a written agreement which is set forth verbatim in the declaration. By the terms of the contract the parties agreed as follows: Plaintiff licensed the defendant to manufacture and sell roller skates wheels and track rollers under plaintiff's Letters Patent during the term thereof and further agreed to oversee and supervise, so far as he is able, the manufacture of skates wheels and track rollers manufactured by the second party (defendant). Then follows a provision that requires plaintiff to turn over his equipment to the defendant. The contract then contains other provisions, the meaning of two of them being in controversy; they are as follows:

"First: In case of an oral license and the conversion of said license at the first party, the second party agrees to pay to the first party twenty-five (25%) per cent of the net profits received by said second party on all skates wheels manufactured by the second party during the life of this agreement, and twenty-five (25%) per cent of the net profits received by said second party on all track rollers manufactured by said second party during the life of this agreement."

"Second: The second party agrees to make an annual statement with the first party of the first party as to the profits and losses of the business during the year prior to settlement. Date of such statement shall be as near after May 1st as is possible. This date being known to the first party, and further agrees to advance to the first party the sum of \$1000.00 during a month on account to apply against such future profits."

Plaintiff further alleges in his declaration that he turned over his equipment as provided in the contract and performed the other duties required of him by the contract; that the defendant took possession of the equipment and commenced to manufacture the roller skates wheels and the roller tracks under the license from the date of the contract until the termination of the contract. The defendant claims to have no record of the equipment and that it was turned over to the defendant by the plaintiff.

\$6050, but that since June 31, 1924, defendant ceased to pay the \$200 a month as required by the contract, and that there is a balance due plaintiff of \$3550.

The defendant in its special pleas admitted making the contract as alleged in the declaration and averred that by the terms of the contract the defendant was required to pay plaintiff 25 per cent of the net profits received by the defendant from the sale of the goods manufactured under the Letters Patent during the life of the agreement; that defendant further agreed to advance to plaintiff \$200 a month to apply against future profits derived by the defendant from the sale of the articles which it was manufacturing under the terms of the contract. The plea further set up that plaintiff agreed to repay the defendant any excess that the \$200 a month might exceed 25 per cent of the profits; that on April 30, 1925, there was a settlement between the parties and it was agreed that the 25 per cent from the making of the contract until that date was \$6019.50; that during the same period defendant had advanced plaintiff \$5850, so there was a balance due plaintiff from the defendant of \$169.50. The second special plea filed by the defendant was substantially to the same effect, except that it was averred that on April 30, 1924, the parties had a settlement and that at that time the 25 per cent amounted to \$3903.90; that the defendant had paid plaintiff up to that time \$5850, being \$1946.10 more than plaintiff was entitled to; that plaintiff at that time promised to repay this excess to the defendant; that during the period from April 30, 1924, to April 30, 1925, the 25 per cent coming to plaintiff under the contract amounted to \$2115.60, so that there was a balance due on the latter date from the defendant to plaintiff of \$169.50. The third paragraph of the defendant's affidavit of merits, which on motion of plaintiff the court refused to strike, set up in substance the defense as averred in plaintiff's special pleas.

...that since June 21, 1934, defendant agreed to pay the
\$200 a month as provided by the contract, and that there is a
balance due plaintiff of \$200.
The defendant in its special plea admitted making
the contract as set out in the declaration and averred that by
the terms of the contract the defendant was required to pay plaintiff
\$200 per cent of the net profits received by the defendant from
the sale of the goods manufactured under the license patent during
the life of the patent; that defendant, after agreeing to ad-
vance to plaintiff \$200 a month to apply against future
dividends by the defendant from the sale of the articles which it
was manufacturing under the terms of the contract. The plea further
set up that plaintiff agreed to repay the defendant any excess that
the \$200 a month might exceed 25 per cent of the profits; that on
April 30, 1935, there was a settlement between the parties and it
was agreed that the 25 per cent from the making of the settlement
until that date was \$200.00; that during the same period defendant
had advanced plaintiff \$200, so there was a balance due plaintiff
from the defendant of \$20.00. The second special plea filed by the
defendant was substantially to the same effect, except that it was
averred that on April 30, 1934, the parties had a settlement and
that at that time the 25 per cent amounted to \$200.00; that the
defendant had paid plaintiff up to that time \$200.00, being \$20.00
more than plaintiff was entitled to; that plaintiff at that time
promised to repay this excess to the defendant; that during the
period from April 30, 1934, to April 30, 1935, the 25 per cent
amount to plaintiff under the contract amounted to \$212.50, so
that there was a balance due on the latter date from the defendant
to plaintiff of \$12.50. The third paragraph of the defendant's
affidavit of merits, which on motion of plaintiff the court returned
is set up in substance the defense as averred in plaintiff's
second plea.

The controlling question in the case, as argued by counsel for both parties, is the meaning of the contract entered into between the parties, and particularly the true meaning of paragraphs 3 and 5, above quoted in full. Plaintiff's contention is that under the terms of the contract the defendant was required to advance to plaintiff \$200 a month during the term of the contract, and that about May 1st of each year there should be an accounting between the parties and if the 25 per cent of the net profits exceeded the \$200 a month, then the defendant should pay such excess, but if the 25 per cent did not amount to as much as the \$200 a month, then plaintiff was to retain the \$200 a month. In other words, that plaintiff was to receive a minimum of \$200 a month. While on the other hand, the defendant's contention is that if the \$200 advanced monthly by the defendant was more than the 25 per cent of the net profits, then the plaintiff should return such excess to the defendant.

We think the contention of the plaintiff must be sustained. Paragraph 3 requires the defendant to pay to the plaintiff 25 per cent of the net profits received by the defendant on all skate wheels and truck rollers manufactured by the defendant during the life of the agreement; the period covered by the agreement was the unexpired term of Plaintiff's Letters Patent, which was approximately thirteen years. The Letters Patent were dated November 17, 1917, and were for a period of seventeen years. The contract in question was executed September 21, 1921.

Paragraph 5 of the contract provides that there shall be an annual settlement between the parties about May 1st of each year so that the amount of the net profits might be ascertained. That paragraph then provides that the defendant "further agrees to advance to the party of the first part (plaintiff) two hundred (\$200.00) dollars a month on account to apply against such future profits." While the language is not as explicit as it might be,

The controlling question in the case, as argued by
counsel for both parties, is the meaning of the contract entered
into between the parties, and particularly the true meaning of
paragraphs 3 and 4, above quoted in full. Plaintiff's contention
is that under the terms of the contract the defendant was required
to advance to plaintiff \$200 a month during the term of the con-
tract, and that about May 1st of each year there should be an ac-
counting between the parties and if the 25 per cent of the net
gross exceeded the \$200 a month, then the defendant should pay
such excess, but if the 25 per cent did not amount to as much as
the \$200 a month, then plaintiff was to receive the \$200 a month.
In other words, that plaintiff was to receive a minimum of \$200
a month. While on the other hand, the defendant's contention is
that if the \$200 advanced monthly by the defendant was more than
the 25 per cent of the net profits, then the plaintiff should re-
ceive such excess as the defendant.

We think the contention of the plaintiff must be sus-
tained. Paragraph 3 requires the defendant to pay to the plain-
tiff 25 per cent of the net profits received by the defendant on
all sales of goods and truck rollers manufactured by the defendant
during the life of the agreement; the profits covered by the agree-
ment was the unexpired term of plaintiff's Letters Patent, which
was approximately thirteen years. The Letters Patent were dated
November 17, 1911, and were for a period of seventeen years. The
contract in question was executed September 11, 1921.

Paragraph 4 of the contract provides that there shall
be an annual settlement between the parties about May 1st of each
year so that the amount of the net profits might be ascertained.
That paragraph then provides that the defendant "for every dollar
advanced to the party of the first part (plaintiff) two hundred
(\$200.00) dollars a month on account to apply against such future
profits." While the language is not as explicit as it might be,

yet we are of the opinion that it requires the defendant to advance \$200 a month to the plaintiff. There is no provision that any part of this should be returned by the plaintiff in case the \$300 a month exceeded 25 per cent of the profits; but the contract clearly provides that the monthly advances are at the end of each year to be deducted from the 25 per cent profits. It is obvious that both parties thought there would be profits in excess of the \$200 a month. A somewhat similar question was involved in Gannon v. Tyree, 148 Ill. App. 99; Pelsenthal & Co. v. Gradwohl, 217 Ill. App. 170; Hall v. Bird-Bergstrom Motor Car Co., 227 Ill. App. 587; Nelson v. American Business Bureau, 241 Ill. App. 431; and authorities cited in those cases, where the decisions are in accordance with the conclusion we here reach.

But the defendant contends that plaintiff "by moving to strike the first paragraph of defendant's affidavit of merits admitted that he was in default in the performance of the contract in question, and by reason of such default his cause of action must fail." And it is argued that this is so because plaintiff's motion to strike that paragraph of the affidavit of merits operated as a demurrer and admitted the truth of the allegations of that paragraph, and, therefore, it appearing that plaintiff had defaulted in the performance of the contract, he could not recover. The difficulty with this contention is that the question is not before us on this appeal. The court sustained plaintiff's motion to strike that part of the affidavit of merits and apparently the defendant was satisfied with this ruling. No exception or objection was made to it in the trial court nor in this court. No cross errors are assigned, so the ruling of the court on this question is not before us for decision.

Since we hold that the contract entered into between the parties requires the defendant to advance \$200 monthly to

for we are of the opinion that it requires the defendant to advance \$200 a month to the plaintiff. There is no provision that part of this should be returned by the plaintiff in case the \$200 a month exceeded 25 per cent of the profits; but the contract clearly provides that the monthly advances are at the end of each year to be deducted from the 25 per cent profits. It is obvious that both parties thought there would be profits in excess of the \$200 a month. A somewhat similar question was involved in Gannon v. Yates, 114 Ill. App. 2d 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

plaintiff, the judgment of the Circuit court of Cook county is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Witchett, P. J., and McGuire, J., concur.

plaintiff, the judgment of the Circuit Court of Cook County in
reversed and the cause remanded for further proceedings not
inconsistent with the views herein expressed.
REVERSED AND REMANDED.

Metcalfe, J. J., and Reynolds, J. J., concur.

JOHN S. PAUL,
Appellee,

vs.

JOSEPH S. CARA,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover a balance of \$116 claimed to be due him as wages earned by him in doing plastering work for the defendant, and a further sum of \$35 as attorney's fees to be taxed as costs. The statement of claim alleged that plaintiff had worked as a plasterer 95 hours; that he had been paid \$50 by the defendant, leaving a balance due of \$116, together with the attorney's fees.

The defendant filed an affidavit of merits wherein he denied that plaintiff had performed 95 hours of labor as a plasterer, but averred that defendant had hired plaintiff to do some patching work and agreed to pay him \$50 for the job; that the work was done and the \$50 was paid to plaintiff.

Plaintiff gave testimony to the effect that he had worked 95 hours as plasterer for defendant on the latter's building which was being remodeled. In support of this he produced a memorandum book showing the several hours he had worked, which totaled 95 hours. He also offered other corroborating evidence tending to sustain his claim.

The defendant testified that he was the owner of a building at No. 113 Germania place; that he had hired plaintiff to do some plastering on the premises and further testified that plaintiff had not performed more than twenty to twenty-five hours work, for which the defendant paid \$50.

There was a conflict, as is disclosed by the testimony

24-A-637

1931 - 1932

APPEAL FROM MUNICIPAL COURT
OF CHICAGO

JOHN S. BARKER
Appellant
vs.
JOSEPH S. CARA
Appellee

Plaintiff brought suit against the defendant to recover a balance of \$110 claimed to be due him as wages earned by him in being plastering work for the defendant, and a further sum of \$22 as attorney's fees to be taxed as costs. The statement of claim alleged that plaintiff had worked as a plasterer 55 hours; that he had been paid \$50 by the defendant, leaving a balance due of \$110, together with the attorney's fees.

The defendant filed an affidavit of denial wherein he denied that plaintiff had performed 55 hours of labor as a plasterer, but averred that defendant had hired plaintiff to do some plastering work and agreed to pay him \$50 for the job; that the work was done and the \$50 was paid to plaintiff.

Plaintiff averred that the effect of the affidavit was to work 55 hours as a plasterer for defendant on the latter's building which was being remodelled. In support of this he produced a memorandum book showing the several hours he had worked, which totaled 55 hours. He also offered other corroborating evidence tending to sustain his claim.

The defendant testified that he was the owner of a building at No. 1122 Commercial Avenue; that he had hired plaintiff to do some plastering on the premises and further testified that plaintiff had not performed more than twenty to twenty-five hours work, for which the defendant paid \$50.

of the witnesses. The trial Judge heard and saw the witnesses on the stand and observed their demeanor. He was in a much better position than are we, sitting in a court of review, to determine the truth of the matter in controversy; and unless we can say that his finding is against the manifest weight of the evidence, we are not warranted under the law in disturbing it. Upon a careful consideration of all the evidence in the record we are clearly of the opinion that we would not be warranted in disturbing the finding in favor of the plaintiff.

The defendant further contends that the court erred in taxing attorney's fees in the sum of \$35 as costs in the case, on the ground that under the statute (sec. 14, chap. 13, Cahill's Statutes) such allowance is unwarranted unless the evidence shows that plaintiff has devoted "his entire and continuous time to his employer." We think the contention cannot be sustained. There is no such requirement in the statute. The statute provides in substance that whenever a mechanic, artisan, miner or laborer shall have cause to bring suit for his wages, it shall be the duty of the court to allow the plaintiff a reasonable attorney's fees if the other provisions of the statute, such as giving of notice, are complied with. There is no contention that the statute was not complied with except as above stated. We think the contention made by the defendant is unwarranted, and it therefore follows that the judgment of the Municipal court of Chicago must be affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

of the witnesses. The trial judge heard and saw the witnesses on the stand and observed their demeanor. He was in a much better position than we, sitting in a court of review, to determine the truth of the matter in controversy; and unless we can say that his finding is against the manifest weight of the evidence, we are not warranted under the law in disturbing it. Upon a careful consideration of all the evidence in the record we are fully of the opinion that we would not be warranted in disturbing the finding in favor of the plaintiff.

The defendant further contends that the court erred in awarding attorney's fees in the sum of \$350 as costs in the case, on the ground that under the statute (sec. 14, chap. 15, Gen. Stat.) such allowance is warranted unless the evidence shows that plaintiff has devoted "his entire and continuous time to his employer." We think the contention cannot be sustained. There is no such requirement in the statute. The statute provides in substance that whenever a mechanic, artisan, miner or laborer shall have cause to bring suit for his wages, it shall be the duty of the court to allow the plaintiff a reasonable attorney's fee if the other provisions of the statute, such as giving of notice, are complied with. There is no contention that the statute was not complied with except as above stated. We think the contention made by the defendant is unwarranted, and it therefore follows that the judgment of the Municipal court of Chicago should be affirmed.

AFFIRMED.

WILLIAM J. ...

...

A. M. GRAHAM, also known
as AVIS GRAHAM GLASCOCK,
Appellant,

vs.

UNITED STATES MERCHANTS &
SHIPERS INSURANCE COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant on a policy of insurance to recover the value of a Packard automobile alleged to have been stolen. At the close of the plaintiff's case there was a directed verdict for the defendant, judgment was entered on the verdict and plaintiff appeals.

The question for our determination is whether there is any evidence in the record that would warrant the jury in finding that all material averments of the declaration had been proven. If there is such evidence, the judgment is wrong and should be reversed. Libby, Nicholl & Libby v. Cook, 222 Ill. 206.

Plaintiff testified that her name was Avis Graham Glascock; that she married Brent Glascock, now in the Federal penitentiary at Leavenworth, Kansas; that her maiden name was Avis M. Graham; that she was a graduate nurse and had practiced her profession in Kansas, Missouri and Oklahoma; that she was also engaged in the advertising and oil business; that she handled oil leases for her father; that on April 24, 1924, she was engaged in the oil business and doing nursing under the name of A. M. Graham; that on April 26, 1924, she lived at No. 7142 Ridgeland avenue, Chicago; that she owned the Packard car in question, which had been purchased for her by her husband; that from April 26th to June 20, 1924, she kept it in a garage on Ridgeland avenue and that she and her husband both drove the automobile; that about June 20th she

[Faint, illegible text]

went to the garage for the car and found that it had been taken out by her husband; that she did not see it again, and November 3, 1934, she was told that the car had been stolen from a garage in Lake Forest; that she went over to the insurance agents, Fennert Brothers, who issued the insurance policy, and spoke to them about the theft; that they told her to go and see a man by the name of Buckley, whose office was at No. 166 W. Jackson boulevard, Chicago; that about November 7th she, together with a postoffice inspector, went to see Buckley; that she told him that the car had been stolen and asked him for blanks so that proof of loss might be made; that Buckley asked her if she was not the wife of Glascock who was recently implicated in a mail robbery, and she replied that she was; that he then said to her it was no use for her to get any blank papers because the company would not pay the claim. She further testified that prior to the purchase of the Packard car she had gone with her husband to the Packard company's place of business in Chicago and looked over the various models with him; that she was not present when the automobile was bought, and it appears that she was out of the city at the time. She also testified that one had done some oil business for her father, who was located in Kansas. She gave further testimony, but we think it unnecessary to refer to it here.

C. Paul Leathers testified that he was a salesman for the Packard company, and that a man who gave his name as A. M. Graham came to the automobile agent's place of business and examined their several cars with a view to purchasing one; that during the negotiations, which extended over a period of time, plaintiff was with A. M. Graham and he understood she was his wife; that at the time the car was bought by the man who gave his name as A. M. Graham, he stated that he was buying the car for his wife, who was in Kansas City, and that she would have to D. E. the

purchase; that he had, prior to that time, bought for her a Studebaker car which he wanted to turn in as part payment on the Packard; that at the time the Packard car was sold, the witness stated to Graham that he ought to have the car insured, and it was agreed that the witness should write the insurance, which was accordingly done and the policy in question delivered.

Plaintiff's husband, Brent Glascock, who was confined in the Federal prison at Leavenworth, testified by deposition that his wife's maiden name was A. M. Graham; that in 1924 he and his wife were living at No. 7140 Ridgeland Avenue, Chicago; that his wife was a graduate nurse and was also engaged in the advertising and oil business; that he bought the Packard car for his wife; that he told the Packard salesman that he was buying the car for his wife; that he ^{had} also bought a Studebaker car for his wife and was turning it in as part payment on the Packard; that at the time of the purchase of the car he and the salesman discussed having the license transferred from the Studebaker to the Packard and the salesman filled out proper blanks and said he would attend to the matter. Thereupon the witness signed the blanks as A. M. Graham; that afterwards the car was kept at a garage near where they lived; that in June, 1924, he took the car and put it in a garage in Lake Forest; that he and his wife were having some trouble at that time. It further appears from the evidence that afterwards, when the witness was taken into custody in Michigan sometime in October, 1924, for a train robbery which occurred at Roundout, Illinois, about June 12, 1924, he was brought back to Chicago, his wife being with him; that during the early days of November he went with the Federal authorities to the Lake Forest garage and asked for the car and was informed that the car had probably been stolen and that it was not there. The evidence further shows that the car has not been found. There was other evidence as to the value of the car.

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Upon a careful consideration of all the evidence in the record, we are of the opinion that there was sufficient evidence to warrant the submission of the case to the jury. It was the function of the jury to determine all the questions involving whether the car belonged to plaintiff; whether it was stolen; whether proof of loss had been waived, and as to the value of the car. We think the evidence made a prima facie case, and it was therefore error to instruct a verdict, as was done.

The judgment of the circuit court of Cook county is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Ketchett, P. J., and McCarthy, J., concur.

2401A. 030

W. T. SMITH & SON, Inc.,
Appellant,

vs.

JOHN CONNIFF,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order entered by the Municipal court of Chicago on March 23, 1927, vacating a judgment theretofore entered in his favor and against the defendant, and vacating a certain order entered in the case. The defendant has entered no appearance in this court.

The record discloses that on February 7, 1927, the court entered an order over-ruling the plaintiff's motion to strike the defendant's affidavit of merits from the files and then proceeded to enter judgment in favor of the plaintiff for a part of plaintiff's claim which the defendant in his affidavit of merits admitted was due and owing, the amount being \$382.87. The court there further reserved for future determination the balance of plaintiff's claim. Forty-five days later the court, on motion of the defendant, entered an order vacating an interlocutory order entered in the case on December 29, 1926, and also vacated and set aside the judgment of February 7th, and it is from that order that plaintiff prosecutes this appeal.

In support of his motion the defendant submitted the petition of Maurice Burger, an attorney at law, in which petition the attorney set up that he was an attorney at law associated with and employed by the attorney for the defendant; that he entered his appearance on behalf of the defendant on November 6, 1926; that on December 29, 1926, plaintiff moved the court to strike the defendant's affidavit of merits and for

2-11-1936

APPEAR FROM NEW YORK COUNTY

OF CHICAGO

W. T. SMITH & SON, INC.
Applicant

JOHN GONNETT,
Respondent

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse an order entered by the Municipal Court of Chicago on March 25, 1935, granting a judgment therefor entered in his favor and against the defendant, and vacating a certain order entered in the case. The defendant has entered no appearance in this court.

The record discloses that on February 7, 1935, the court entered an order overruling the plaintiff's motion to strike the defendant's affidavit of merits from the file and then proceeded to enter judgment in favor of the plaintiff for a part of plaintiff's claim which the defendant in his affidavit of merits admitted was due and owing, the amount being \$322.87. The court there further reserved for future determination the balance of plaintiff's claim. Subsequent to the entry of the order, entered an order vacating an entry of judgment entered in the case on December 20, 1934, and also vacated and set aside the judgment of February 7th, and it is thus that order that plaintiff prosecutes this appeal. In support of his motion the defendant submitted the petition of Maurice Burger, an attorney at law, in which he stated that he was an attorney at law associated with and employed by the attorney for the defendant; that he entered his appearance on behalf of the defendant on November 4, 1935; that on December 20, 1934, plaintiff moved the court to strike the defendant's affidavit of merits and for

a judgment in his favor, but the motion was denied and leave was given the defendant to file an amendment "to paragraph one of the defendant's affidavit of merits in five days;" that thereupon plaintiff moved the court for a judgment "on the account stated" as alleged in plaintiff's statement of claim in the sum of \$382.87; that plaintiff's motion was denied; that on January 4, 1927, the defendant filed an amendment to paragraph one of his affidavit of merits; that on January 27th plaintiff moved to strike the affidavit of merits and for judgment for the \$382.87, which motion was entered and continued and placed upon the contested calendar for February 7th; that on February 7th, "through inadvertence, misunderstanding and confusion," defendant's attorney awaited the call of the motion in room 809 instead of room 806, the latter room being the court room in which the motion was pending, and therefore the defendant was not present to oppose the motion of plaintiff, and it was allowed and judgment entered in plaintiff's favor for \$382.87, upon which an execution was issued. The petition set up that the clerk of the court, through error, entered the order of December 29th; that the erroneous order showed that plaintiff's motion to strike defendant's affidavit of merits was allowed and the defendant given five days to file an amended affidavit of merits; that the order should have been as above stated, denying the motion and giving the defendant leave to amend one paragraph of his affidavit of merits; that if the order of December 29th had been properly spread of record, the court would not have entered the judgment on February 7th.

We think the court was in error in vacating the judgment of February 7th. The petition filed by the attorney for the defendant expressly shows that he was guilty of negligence, and there is little or no excuse given for such neglect. Moreover,

a judgment in his favor, but the motion was denied and leave was given the defendant to file an amended "affidavit of service" and to show cause why the defendant's affidavit of service in five days; that thereupon plaintiff moved the court for a judgment "on the merits" as alleged in plaintiff's statement of claim in the sum of \$382.57; that plaintiff's motion was denied; that on January 4, 1927, the defendant filed an amended and re-petition one of his affidavits of service; that on January 17th plaintiff moved to strike the affidavits of service and for judgment for the \$382.57, which motion was entered and concluded and placed upon the contested calendar for February 7th; that on February 7th, through inadvertence, without hearing and conclusion, defendant's attorney waived the call of the motion in room 305 instead of room 306, the latter room being the court room in which the motion was pending, and therefore the defendant was not present to oppose the motion of plaintiff, and it was allowed and judgment entered in plaintiff's favor for \$382.57, upon which an execution was issued. The position set up that the clerk of the court, through error, entered the order of December 28th; that the execution order showed that plaintiff's motion to strike defendant's affidavits of service was allowed and the defendant given five days to file an amended affidavit of service; that the order should have been as above stated, denying the motion and giving the defendant leave to amend one paragraph of his affidavit of service; that if the order of December 28th had been properly entered of record, the court would not have entered the judgment on February 7th.

We think the court was in error in vacating the judgment of February 7th. The position filed by the attorney for the defendant expressly shows that he was guilty of negligence, and there is little or no excuse given for such neglect. Moreover,

the motion to vacate the judgment having been made more than thirty days after the judgment was entered, the defendant could avail himself of only such matters as might be availed of under Section 86 of the Practice act. The alleged error was not such an one as might be corrected under Section 86 of the Practice act. Chapman v. North American Life Ins. Co., 293 Ill. 176. But in any view of the case, the judgment should not have been set aside. Not only does the petition fail to excuse the negligence of the attorney for the defendant, but it fails to show that the defendant had any meritorious defense, and also fails to show that defendant had not admitted in his affidavit of merits that he owed the \$382.87.

The order of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

the motion to vacate the judgment having been made more than thirty days after the judgment was entered, the date that counts against himself at only such matters as might be available at under Section 37 of the Practice act. The alleged error was not such

as one as might be corrected under Section 37 of the Practice act. Section 37 of the Practice act is not applicable in this case. But in any view of the case, the judgment should not have been

set aside. The only error the defendant has in making out his petition is in the statement that the defendant was not admitted in his affidavit. The defendant had not admitted in his affidavit that he owed the \$250.00.

The error of the defendant in making out his petition is corrected and the case is remanded.

Reversed and remanded. 111 pages.

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THE FISH NET AND TWINE CO.,
a Corporation,

Appellee,

vs.

HARRY DISSEN and E. DISSEN,
Copartners, Trading as
SOUTHWESTERN SMOKE FISH CO.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendants, claiming that \$4282.93 was due it from the defendants by virtue of a written guaranty executed by the defendants, whereby defendants guaranteed payment of the account of the Henry Lafond Fish Company of Two Rivers, Wisconsin. The case was tried before the court without a jury, the court found in favor of the plaintiff and against the defendants for \$3984.40, judgment was entered on the finding and the defendants appeal.

Plaintiff's declaration declared on the written guaranty and that plaintiff, relying upon the guaranty, sold and delivered to the Henry Lafond Fish Company merchandise at a price of \$4282.93; that the Fish company failed to pay the bill; that demand was made on the defendants but that the account was not paid. With the declaration plaintiff filed an affidavit of claim. The defendants filed a number of pleas and an affidavit of merits. They set up that they never received notice of the acceptance of the alleged guaranty, that there was no consideration for it, and that they received no notice of the default of the Henry Lafond Fish Company.

The evidence tends to show that plaintiff had a branch office in Milwaukee where it conducted its business; that it had been selling fish nets to the Henry Lafond Fish Company; that the Henry Lafond Fish Company was engaged in the business of

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

CLAYTON and S. THOMAS,
Appellants,
vs.
WILLIAM H. HARRIS,
Appellee.

THE COURT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the
defendant, William H. Harris, for the recovery of the
value of a written guaranty issued by the defendant, as
defendant's authorized agent of the account of the Henry Leland
Fish Company of New Haven, Connecticut. The case was tried before
the court without a jury, the court found in favor of the plain-
tiff and against the defendant for \$2500.00. Judgment was entered
on the finding and the defendant appeals.

The plaintiff's declaration set out on the written
guaranty and that plaintiff, relying upon the guaranty, sold and
delivered to the Henry Leland Fish Company merchandise at a price
of \$1482.93; that the fish company failed to pay the bill; that
demand was made on the defendant but that the account was not
paid. With the declaration plaintiff filed an affidavit of service.
The defendant filed a number of pleas and an affidavit of service.
They set up that they never received notice of the assignment of
the alleged guaranty, that there was no consideration for it, and
that they received no notice of the bill of the Henry Leland
Fish Company.

The evidence tends to show that plaintiff had a
branch office in New Haven where it conducted its business; that
it was well known to the Henry Leland Fish Company;

catching and selling fish; that it sold fish to the defendants, whose place of business was in Chicago; that it owed plaintiff about \$2,000 for goods sold and delivered and was desirous of purchasing further goods from plaintiff and wanted an additional credit of approximately \$4,000; that plaintiff refused to extend further credit unless the account was guaranteed; and it was then stated that the defendants would guarantee the account since they were buying fish from the Henry Lafond Fish Company, and plaintiff being apprised of this fact, on November 9, 1925, wrote defendants a letter in reply to a letter received by plaintiff from defendants dated October 28, 1925, in which defendants offered to guarantee the account, in which letter plaintiff acknowledges receipt of defendants' letter and states, in reference to the order placed with plaintiff by the Lafond Fish Company, that it would be agreeable to plaintiff and it would go ahead and fill the order then on file if the defendants would guarantee the account, the order being for approximately \$4,000. The letter further stated that plaintiff had drawn up a written guaranty which it enclosed with the letter to the defendants. The letter further states that plaintiff was assured that the defendants would approve of the enclosed guaranty and that it would appreciate the execution and return of the guaranty by the defendants as soon as possible, and advising the defendants that the Lafond Fish Company had requested that the fish nets which plaintiff was to sell to the Lafond Fish Company be sent not later than December 1st - "We can start partial delivery within the next ten days and very easily complete the order by the time requested. They seem to think it will be possible to take care of this transaction within about six months, curtailing same, however, at intervals, which time will be agreeable to us." The guaranty was received by the defendants, signed by them on November 15, 1925, and returned to plaintiff. The guaranty recites:

"Whereas, Henry Lafond Fish Co. *** being engaged in the commercial fishing industry *** and having arrangements with the Southwestern Smoked Fish Company *** Chicago, Ill., for the purchase of its supply of fish; and

"Whereas, in order to properly operate the fishing rig it is necessary that Henry Lafond Fishing Co. purchase additional equipment by way of nets, twines, etc., from some concern engaged in the selling thereof, and it having agreed to purchase such equipment from the Fish Net & Twine Co. at Milwaukee, Wis., at a price not to exceed approximately Four Thousand Dollars (\$4000.00) and said Southwestern Smoked Fish Company *** being interested in the successful operation of the business of Henry Lafond Fish Co. of Two Rivers, Wisconsin, and desirous of helping place same in operation by assisting in securing the necessary equipment;

"Now, Therefore, in consideration of the Fish Net and Twine Company's supplying to Henry Lafond Fish Co. *** fishing equipment by way of nets, etc., during the winter season of 1925 to 1926 as per order now on file with said Fish Net and Twine Company to an amount not to exceed approximately Four Thousand Dollars (\$4000.00) the Southwestern Smoked Fish Co.*** does hereby guarantee to the Fish Net & Twine Company the payment of the amount of the bill for such merchandise and equipment so furnished not to exceed approximately Four Thousand Dollars (\$4000.00), said amount to be paid by Henry Lafond Fish Co. in accordance with the terms of such agreement as may be entered into between the Fish Net & Twine Company and Henry Lafond Fish Company as to time of payment and if the amount of said bill is not paid within thirty (30) days after it becomes due in accordance with the terms of the agreement as to time of payment, we hereby agree to pay same."

The evidence further shows that upon receipt of the guaranty by plaintiff it began to fill the order by delivering the nets, etc., to the Henry Lafond Fish Co., the last delivery being on December 22, 1925; that the total price at which the goods were sold was \$4282.93. Evidence on behalf of the plaintiff was further to the effect that when the last of the goods were delivered on December 22nd, it mailed a statement of the account to the defendants and also to the Lafond Fish Co. and that it mailed like statements monthly thereafter. The statement in the record showed that the goods were sold upon discount of 5 per cent if paid within ten days, 2½ per cent discount if paid within thirty days, 60 days net, and that plaintiff received no payment for the goods. There is some further evidence in the record on behalf of the plaintiff to the effect that the first statement it sent the defendants was mailed April 1, 1926; that on May 7th plaintiff wrote the defendants a letter enclosing a statement and inquiring about payment of the ac-

Whereas, Henry Latend Fish Co. was being engaged in the same
metal fabricating industry as and having arrangements with the
Southern States Lumber Co. and the Fish Co. for the pur-
chase of the amount of \$100,000.00;
Whereas, in order to properly operate the fishing rig
it is necessary that Henry Latend Fish Co. purchase additional
equipment by way of nets, twines, etc., from some source engaged
in the fishing industry, and it having agreed to purchase such
equipment from the Fish Co. at \$100,000.00, as a
price not to exceed approximately four thousand dollars (\$4,000.00)
and said Southern States Lumber Co. being interested in
the successful operation of the business of Henry Latend Fish Co.
of Two Rivers, Wisconsin, and desiring to help place same in
operation by assisting in securing the necessary equipment;
Now, therefore, in consideration of the sum of one and twelve
cents, a quantity of Henry Latend Fish Co. fishing equipment
to wit, nets, etc., during the winter season of 1928 to 1929 as
set forth now on file with said Fish Co. and Twine Company, to be
amount not to exceed approximately four thousand dollars (\$4,000.00)
the Southern States Lumber Co. does hereby guarantee to the
Fish Co. the payment of the amount of the bill for
such necessary and equipment as furnished not to exceed approxi-
mately four thousand dollars (\$4,000.00), said amount to be paid by
Henry Latend Fish Co. in accordance with the terms of each agree-
ment as may be entered into between the Fish Co. and Twine Company
and Henry Latend Fish Company as to time of payment and as to
amount of said bill is not paid within thirty (30) days after it
becomes due, in accordance with the terms of the agreement as to
time of payment, we hereby agree to pay same."

The evidence further shows that upon receipt of the
guaranty by plaintiff it began to fill the order by delivering the
nets, etc., to the Henry Latend Fish Co., the last delivery being
on December 22, 1928; that the total price at which the goods were
sold was \$13,252.93. Evidence on behalf of the plaintiff was further
to the effect that when the lot of the goods were delivered on
December 22nd, it mailed a statement of the amount to the defendant
and also to the Latend Fish Co. and that it mailed like statements
monthly thereafter. The statement in the record shows that the
goods were sold upon account at 5 per cent if paid within ten days,
2 1/2 per cent discount if paid within thirty days, 10 days net, and
that plaintiff received no payment for the goods. There is some
further evidence in the record on behalf of the plaintiff to the
effect that the first statement it sent the defendant was mailed
May 1, 1929; that on May 7th plaintiff wrote the defendant a
letter enclosing a statement and inquiring about payment of the ac-

count and asking for an early reply. On May 3th defendants replied stating that they were then writing a letter to the Lafond Fish Company asking why the bill had not been paid, and advised plaintiff that it would no doubt hear from the Lafond Fish Company within a few days. Plaintiff replied to this letter on May 11th, stating that it was glad to learn that the defendants had taken the matter up with the Lafond Fish Company and expressing the hope that the account would soon be paid. On June 5th plaintiff again wrote the defendants, stating that plaintiff was informed that the reason the Lafond Fish Company had not paid the bill was the fact that the Fish company was building a new boat, and advised the defendants that the account was due and payable from them on March 22nd. The evidence further shows that in any dealings had between plaintiff and the Lafond Fish Company, plaintiff had always extended sixty days credit, and that was the understanding in reference to the bill in question.

One of the defendants testified that he did not receive any statement of the account from plaintiff on or about December 22nd, 1925, showing that the merchandise had been delivered by the plaintiff to the Lafond Fish Company, nor at any time prior to that date; that the first notice defendants received that the bill had not been paid by the Lafond Fish Company was when they received the letter of May 7th above mentioned. The witness further testified that they purchased fish from the Lafond Fish Company during the winter; that on February 22, 1926, defendants had in their possession between three and four thousand dollars which they owed the Lafond Fish Company; that in March they owed them about \$2500. Upon objection this evidence was stricken out. The defendants further offered checks which they had sent to the Lafond Fish Company in payment of fish covering this period of time. The offer was objected to and the evidence excluded. The court then interrogated

...and asking for an early reply. On May 15th the defendant replied
stating that they were then waiting a letter to the Leland Fish
Company asking why the bill had not been paid, and advised plaintiff
that it would not come from the Leland Fish Company
within a few days. Plaintiff replied to this letter on May 15th,
stating that it was glad to learn that the defendant had taken the
matter up with the Leland Fish Company and expressing the hope that
the account would soon be paid. On June 8th plaintiff again wrote
the defendant, stating that plaintiff was informed that the reason
the Leland Fish Company had not paid the bill was the fact that
the fish company was building a new boat, and advised the defendant
that the account was due and payable from them on March 22nd. The
defendant further wrote that in any decision had between plaintiff
and the Leland Fish Company, plaintiff had always extended sixty
days credit, and that was the understanding in reference to the bill
in question.

One of the defendants testified that he did not receive
any statement of the account from plaintiff on or about December
22nd, 1935, showing that the merchandise had been delivered by the
plaintiff to the Leland Fish Company, nor at any time prior to that
date; that the first notice defendant received that the bill had
not been paid by the Leland Fish Company was when they received the
letter of May 15th above mentioned. The witness further testified
that they purchased fish from the Leland Fish Company during the
winter; that on February 22, 1935, defendant had in their posses-
sion between three and four thousand dollars worth of fish from the
Leland Fish Company; that in March they owed them about \$2800. Upon
objection this evidence was excluded. The defendant further
testified that when they had sent to the Leland Fish Company in
reference to fish covering this period of time. The other was ex-
cluded as and the evidence excluded. The court then instructed

the witness as to whether the defendants had reached an understanding with the Lafond Fish Company concerning the matter; and the evidence showed that the defendants' attorney, in response to a proposition from the Lafond Fish Company, obtained an installment note for \$4,000, being the amount of the guaranty, that the Lafond Fish Company paid the defendants three installments of \$125 each, and that the attorney for the defendants still had the money and the note. Counsel for the defendants objected to the court interrogating the witness and moved that this testimony be stricken out. The motion was denied. Thereupon counsel for the defendants withdrew from the case and took the witness stand. He testified that he had a conversation with counsel for plaintiff relative to the acceptance of notes from the Lafond Fish Company during the month of January or February; that he told plaintiff's counsel that he might be able to arrange so that the Lafond Fish Company would pay monthly installments on the account of from \$200 to \$250, and that counsel for plaintiff stated that he would take the matter up with plaintiff; that the witness thereupon stated that he thought he ought to go to Two Rivers and see about getting notes from the Lafond Fish Company, and that it was understood between counsel that in case this was done it would not be used against defendants on the trial.

Abert Lafond testified that the Lafond Fish Company had executed a note for \$4,000 and delivered it to the defendants' attorney and that the Fish company had paid three installments of \$125 each to the defendants' counsel. This is substantially all of the evidence in the record.

The defendants contend that the contract between plaintiff and the Lafond Fish Company was materially altered in that the time of payment was accelerated from six months to sixty days, and that the nets were not delivered by plaintiff to the Lafond Fish company until December 22nd, although it was agreed that they should be delivered not later than December 1st. The argument is that this

the witness as to whether the defendant had received an endorsement
and the witness stated that the defendant's attorney, in response to a
proposition from the Lakeland Fish Company, obtained an endorsement
note for \$4,000, being the amount of the guarantee, that the Lakeland
Fish Company paid the defendant three installments of \$1,333 each,
and that the attorney for the defendant still had the money and the
note. Counsel for the defendant objected to the court investigating
the witness and moved that this testimony be stricken out. The mo-
tion was denied. Thereupon counsel for the defendant withdrew from
the case and took the witness stand. He testified that he had a
conversation with counsel for plaintiff relative to the endorsement
of notes from the Lakeland Fish Company which was made in the
testimony; that he said plaintiff's counsel told him that the
arrangement was that the Lakeland Fish Company would pay monthly installments
on the amount of from \$200 to \$250, and that counsel for plaintiff
stated that he would have the notes as security; that the
witness thereupon stated that he thought he ought to go to the River
and see about getting notes from the Lakeland Fish Company, and that if
they were endorsed between counsel and in some form was done it would
not be used against defendant on the trial.
Thereafter he testified that the Lakeland Fish Company had
endorsed a note for \$4,000 and delivered it to the defendant's at-
torney and that the Fish company had paid three installments of \$1,333
each to the defendant's attorney. This is substantially all of the
evidence in the record.
The defendant contends that the contract between plaintiff
and the Lakeland Fish Company was not lawfully entered in that the
time of payment was accelerated from six months to sixty days, and
that the note was not delivered by plaintiff to the Lakeland Fish
Company until December 22nd, although it was agreed that they should
be delivered not later than December 1st. The argument is that this

was such a material alteration of the contract as to release the defendants, the guarantors. We think the contention cannot be sustained. It is true that plaintiff in its letter of November 9th, in which the written guaranty was enclosed, stated that the Lafond Fish Company "seems to think it will be possible to take care of this transaction within about six months." But the written guaranty, and which was signed by the defendants, expressly stated that plaintiff was to sell to the Lafond Fish Company the goods in question in accordance with the terms of such agreement as might be entered into between the Fish Net & Twine Co. and the Henry Lafond Fish Company as to time of payment. We think the terms of the written guaranty are controlling, and not some casual statement made in the letter; nor is there any provision of the guaranty that states that the plaintiff is to deliver all of the goods to the Lafond Fish company by December 1st. Moreover, no such defense was interposed upon the trial. Nor did defendants in their affidavit of merits set up any such defense. Therefore the defendants are prevented from urging such a defense in this court. The contention now made is obviously an afterthought.

The defendants further contend that the judgment is wrong and should be reversed because they were entitled to be notified of the default of the Henry Lafond Fish Company, and not having received such notice, they are discharged to the extent of the loss which they sustained by reason of such failure to give notice. The defendants in their affidavit of merits allege that they had received no notice of the fact that the Lafond Fish Company had defaulted in payment, but there was no averment that the defendants had sustained any loss on that account. But even if we assume that the affidavit of merits was sufficient to warrant such a defense, we think the evidence offered by the defendants was insufficient because it tends to show that the defendants were collecting

the \$4,000 from the Lafond Fish Company and had obtained its note for that amount. There was also evidence sufficient to warrant the court in finding as a fact that plaintiff had notified the defendants on a number of occasions that the goods had been sold to the Lafond Fish Company on sixty days credit and that no part of them had been paid for, the evidence tending to show that plaintiff sent monthly statements of the account to the defendants. In this view of the case it is obvious that the evidence offered by the defendants was inadmissible. Moreover, the contention is unavailing because we hold that the guaranty in question was an absolute guaranty and under the law no notice of the default was required. The law is clear and it is conceded by both sides that if a guaranty, such as the one in question, be construed to be a collateral continuing guaranty, then unless the guarantor is notified of the default in payment by the principal debtor, and the guarantor shows that he suffered damage by reason of the failure of the plaintiff to notify him of the default, then he is discharged to the extent of the loss he has thus sustained. Tausig v. Reid, 145 Ill. 488. It is also the law and so conceded by counsel, that if there is an absolute guaranty, no notice is required.

In the Tausig case, on which counsel for the defendants principally relies, the guarantors executed a written guaranty, whereby they guaranteed the prompt payment of any indebtedness which might be due and owing to Reid, Murdoch & Fisher by Mrs. Mathilde Zuckerman for goods which she thereafter purchased from Reid, Murdoch & Fisher. The court there pointed out that upon the written guaranty being received by Reid, Murdoch & Fisher they were not obligated to sell nor was Mrs. Zuckerman obligated to buy any goods, so that it was clear that any liability was contingent. But in the instant case the Henry Lafond Fish Company had placed its order with the plaintiff for certain merchandise and the guaranty is to the effect that upon plaintiff receiving the guaranty from the defend-

the \$5,000 from the Eastern Trust Company and had obtained the same for that amount. There was also evidence adduced to support the court in finding as a fact that plaintiff had notified the defendant on a number of occasions that the goods had been sold to the Eastern Trust Company on sixty days credit and that no part of them had been paid for. The evidence tending to show that plaintiff was monthly remitting to the defendant in the amount of the cash it is obvious that the evidence offered by the defendant was inadmissible. Moreover, the contention is that the defendant was held that the guaranty is a condition of the sale and under the law no notice of the defendant was required. The law is clear and it is conceded by both sides that it is a guaranty, such as the one in question, is considered to be a contract, containing guaranty, then unless the guarantor is notified of the default in payment by the principal debtor, and the guarantor knows that he has entered through by reason of the failure of the principal to notify him of the default, then he is discharged to the extent of the loss he has sustained. Knox v. Bell, 100 Ill. 100. It is also the law and is conceded by counsel, that if there is an absolute guaranty, no notice is required. In the present case, an actual contract for the guaranty, and principally verbal, the guarantor executed a written guaranty, whereby they guaranteed the prompt payment of any indebtedness which might be due and owing to Bell, Messrs. A. Fisher by Mrs. Katharine Jackson for goods which she purchased from Bell, and which were received by Bell, Messrs. A. Fisher and they were not obligated to sell nor was Mrs. Jackson obligated to pay any goods, so that it was clear that any liability was contingent. But in the instant case the Eastern Trust Company had placed its order with the defendant for certain merchandise and the guaranty is to the effect that when plaintiff receives the goods from the defendant

ants duly executed, the order would be filled. There was no contingency, but there was a binding obligation upon the plaintiff to sell the merchandise to Henry Lafend Fish Company and a binding obligation on the latter to receive it. In Frost v. Standard Metal Co., 215 Ill. 240, the court held the written guaranty there involved to be absolute and unqualified, and the facts in that case did not render the written guaranty so certain and absolute as in the instant case.

We think the language of Mr. Justice Holmes in the case of Simmons v. Swan, Adv. Op. 72; Sup. Ct. Rep. Vol. 48, p.52, is pertinent here. That was a suit to recover damages for a breach of a contract for the sale of a pickle factory, certain equipment and the good-will of the business. It is there said, "In consequence of a frost the price of pickles had risen greatly, and the judge at the trial said that it was perfectly obvious that the defendant was trying to get out from under his contract."

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Ketchett, P. J. and McGurely, J., concur.

when fully executed, the order would be filled. There was no
agency, and there was a binding obligation upon the plaintiff to
sell the merchandise to Henry Latent Glass Company and a binding
obligation on the latter to receive it. In Trust v. Latent Glass
Co., 115 Ill. 100, the court said: "The contract was not
voided to be absolute and unqualified, and the fact in that case
did not render the written contract no certain and absolute as in
the instant case."

We think the language of Mr. Justice Holmes in the
case of Latent Glass Co. v. Trust, 115 Ill. 100, 101, 102, 103, 104,
is applicable here. That was a suit to recover damages for a breach
of a contract for the sale of a bicycle factory, certain equipment
and the goodwill of the business. It is there said, "In consequence
of a frost the price of bicycles had risen greatly, and the judge at
the trial said that it was perfectly obvious that the defendant was
trying to get out from under his contract."

The judgment of the Circuit court of Cook county is

affirmed.

APPROVED.

RECORDED, 11-1-1911, 11-1-1911.

JOHN J. McGRATH,
Appellee,
vs.
BENJAMIN DRAPSEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover the value of an automobile which he alleged defendant had converted to his own use. The value of the automobile was placed at \$500.

The defendant filed an affidavit of merits in which he set up that he was the owner of the premises known as No. 2451 West Madison street, Chicago, which was occupied by defendant's tenant until about October 1, 1926, when the tenant vacated the premises, leaving some personal property therein, including the automobile in question; that afterwards plaintiff informed the defendant that the automobile belonged to plaintiff and demanded it; that the defendant informed plaintiff that if he produced satisfactory evidence that he owned the machine defendant would turn it over to him; that plaintiff failed to do so, and the defendant did not turn over the machine, but still has it in his possession, but defendant is ready to turn over upon proper proof of the rightful owner; that the automobile was not worth more than \$25.

There was a trial before the court without a jury. The court found in favor of the plaintiff, fixed the damages at \$300, judgment was entered on the finding and the defendant appeals.

The evidence tends to show that plaintiff was engaged in the business of buying and selling second-hand automobiles in

JOHN J. HENRY, JR.
 Plaintiff
 vs.
 JAMES H. HENRY, JR.
 Defendant

IN SENATE CHAMBERS, CITY OF NEW YORK, 1911.

JOHN J. HENRY, JR., Plaintiff, brought an action against JAMES H. HENRY, JR., Defendant, to recover the value of an automobile which he alleged Defendant had converted to his use. The value of the automobile was stated at \$500.

The defendant testified that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile.

It is the defendant's contention that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile. He testified that he did not know the plaintiff and that he did not know the automobile.

There was a trial before the court without a jury. The court found in favor of the plaintiff, fixed the damages at \$500, judgment was entered on the finding and the defendant was ordered to pay the costs.

The evidence tends to show that plaintiff was engaged in the business of buying and selling second-hand automobiles in New York City.

Gary, Indiana; that on June 9, 1926, he bought the automobile in question from Clarence Burke, doing business as the Campbell Motor Sales Company; that Burke's place of business was No. 2451 West Madison street, Chicago; that plaintiff paid \$250 for the car and took it from Chicago to Gary, where he had it overhauled, putting on new tires and making other necessary repairs; that on or about September 20, 1926, plaintiff brought the car back to Chicago and delivered it to the Campbell Motor Sales Company for sale and it was placed in the latter's place of business at No. 2451 West Madison street; that about October 3rd or 4th following he found a purchaser for his car and came to Chicago to get it, went to the West Madison street address but found the place closed and Burke gone; that plaintiff's car was then standing inside of the window in Burke's place of business; that plaintiff inquired around the neighborhood in an endeavor to get into the place of business and obtain the car and learned that the defendant owned the premises; that he endeavored to locate defendant but was unable to do so; that a few days later plaintiff sent Joseph O'Connell to get the car for him; that O'Connell called at the West Madison street address, saw the defendant and asked for the car, which was still in the premises, and exhibited the bill of sale which plaintiff had obtained from Burke when he bought the car on June 9, 1926. O'Connell testified that he exhibited the bill of sale, but defendant refused to deliver the car to him, stating that Burke owed the defendant some rent for the premises and there was some damage to a plate glass window, and that he would not deliver the car unless he obtained payment of his rent and satisfaction for the plate glass. Shortly thereafter plaintiff brought suit.

Evidence offered on behalf of the defendant was to the effect that he owned the premises, which he rented to Burke; that Burke did not owe him any rent but had disappeared, leaving the

Gary, Indiana; that on June 9, 1936, he bought the automobile in question from Clarence Burke, doing business as the Campbell Motor Sales Company; that Burke's place of business was No. 2451 West Madison Street, Chicago; that plaintiff paid \$250 for the car and took it from Chicago to Gary, where he had it overhauled, putting on new tires and making other necessary repairs; that on or about September 20, 1936, plaintiff brought the car back to Chicago and delivered it to the Campbell Motor Sales Company for sale and it was placed in the latter's place of business at 2451 West Madison Street; that about October 27 or 28 following he found a purchaser for his car and came to Chicago to get it, went to the West Madison Street address but found the place closed and Burke gone; that plaintiff's car was then standing outside of the lot in Burke's place of business; that plaintiff contacted around the neighborhood in an effort to get into the place of business and obtain the car and learned that the defendant owned the premises; that he endeavored to locate defendant but was unable to do so; that a few days later plaintiff sent Joseph O'Connell to get the car for him; that O'Connell called at the West Madison Street address, saw the defendant and asked for the car, which was still in the machine and exhibited the bill of sale which plaintiff had obtained from Burke when he bought the car on June 9, 1936. O'Connell testified that he exhibited the bill of sale, but defendant refused to deliver the car to him, stating that Burke owned the defendant name rent for the premises and there was some damage to a plate glass window, and that he would not deliver the car unless he obtained payment of his rent and satisfaction for the plate glass. Shortly thereafter plaintiff brought suit. Defendant offered on behalf of the defendant was to the effect that he owned the premises, which he rented to Burke; that Burke did not owe him any rent but had disappeared, leaving the

automobile and certain other personal property in the premises; that when O'Connell called and demanded the car in question he told O'Connell that he would deliver the car upon O'Connell showing him some proof that plaintiff was the owner of the car; that O'Connell failed to do this, and defendant therefore refused to give up the car. He testified that O'Connell did not exhibit the bill of sale. Two other witnesses called by the defendant testified that they were at the place of business when O'Connell called and demanded the car, and their testimony substantially corroborates that of defendant. Burke was not called by either side - apparently could not be found.

There was further evidence on behalf of the plaintiff tending to show that the car was worth \$500, while the testimony offered by both sides tends to show that after O'Connell had demanded the car some one had taken the tires and cushions from the car and that other damage was done to it. The defendant offered evidence that the car in its damaged condition was not worth more than \$25. There was further evidence by the defendant to the effect that he had taken proper care to see that no one damaged the car, but that apparently some one had broken into the premises.

The defendant contends that the evidence does not disclose that there was a conversion of the car because the defendant's refusal to deliver it up to plaintiff was not absolute, but that the evidence shows that he acted as a reasonable man and refused to deliver it unless there was some proof that the demand was made by the person entitled to the automobile. The evidence on this question is conflicting. O'Connell testified that he exhibited a bill of sale showing that plaintiff had bought a car from Burke. The defendant and two other witnesses testified to the contrary. The trial Judge saw and heard the witnesses and was in a much better position to determine the truth of the

and would not call to the witness stand; that when O'Connell called and demanded the car in question he told O'Connell that he would deliver the car to him; that the car was not the car of the owner of the car; that O'Connell failed to do this, and defendant therefore refused to give up the car. He testified that O'Connell did not exhibit the bill of sale. Two other witnesses called by the defendant testified that they were at the place of business when O'Connell called and demanded the car, and their testimony substantially corroborated that of defendant. Burke was not called by either side - apparently could not be found.

There was further evidence on behalf of the plaintiff tending to show that the car was worth \$500, while the best money offered by both sides tends to show that after O'Connell had demanded the car some one had taken the firm and cashiers from the car and that other damage was done to it. The defendant offered evidence that the car in its damaged condition was not worth more than \$25. There was further evidence by the defendant to the effect that he had taken proper care to see that no one damaged the car, but that apparently some one had broken into the premises. The defendant contends that the evidence does not disprove that there was a conversation of the car because the defendant's refusal to deliver it up to plaintiff was not absolute, but that the evidence shows that he acted as a responsible man and refused to deliver it unless there was some proof that the demand was made by the person entitled to the automobile. The evidence on this point is conflicting. O'Connell testified that he exhibited a bill of sale showing that plaintiff had bought a car from Burke. The action and two other witnesses testified to the contrary. The trial judge saw and heard the witnesses and it was his duty to determine the truth of the

question than are we, sitting in a court of review. We would not be warranted under the law in disturbing his finding unless it is against the manifest weight of the evidence. Upon a careful consideration of all the evidence in the record, bearing in mind that the trial Judge was in a much better position than we are to determine the truth, we are unable to say that his finding is against the manifest weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

VAN SCHLAACK BROS. CHEMICAL
WORKS, INC., a Corporation,
Appellant,

vs.

J. E. MURICH,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of attachment against the defendant, alleging that his claim was based on a written guaranty made by the defendant guaranteeing the account of the Metal Art Studios for goods, wares and merchandise sold by the plaintiff to that concern, and that there was \$709.27 due plaintiff. The grounds set up in the affidavit warranting a writ of attachment were that the defendant was about to depart from the state with the intention of having his effects removed from the city, and other statutory grounds. The bailiff under the writ attached defendant's automobile; the defendant thereupon gave a forthcoming bond to the bailiff, who turned back the car to the defendant. The defendant traversed the grounds of attachment. The case was tried before the court without a jury; the court found against the plaintiff on the attachment and on the merits, judgment was entered on the finding and plaintiff appeals.

Defendant was called as a witness by plaintiff under section 33 of the Municipal Court act. He testified that he was secretary and treasurer of the Metal Art Studios, a corporation, and owned fifty per cent of its stock; that it owed plaintiff \$709.27. He further testified that the Metal Art Studios went into bankruptcy, but the evidence later showed that they made a composition with their creditors. The record then discloses that there was some discussion between court and counsel as to whether they would

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VAN SCHLACK, ERIC, CHIEF OF POLICE
HONORABLE JUDGE, a corporation
Applicant

APPEAL FROM MUNICIPAL COURT

OF CHICAGO

Appellate Court

JUSTICE P. CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against the defendant, alleging that his claim was based on a written receipt made by the defendant guaranteeing the account of the hotel and station for goods, wares and merchandise sold by the plaintiff to that defendant, and that there was \$100.00 due plaintiff. The grounds set up in the plaintiff's warranting a writ of attachment were that the defendant was about to depart from the state with the intention of leaving his effects removed from the city, and a show return was made under the writ attached and return of attachment returned. The plaintiff under the writ attached and return of attachment; the defendant thereupon gave a forthcoming bond to the plaintiff, who turned back the car to the defendant. The defendant traversed the grounds of attachment. The case was tried before the court without a jury; the court found against the plaintiff on the attachment and on the merits. Judgment was entered on the finding and plaintiff set aside.

Defendant was called as a witness by plaintiff under section 33 of the Evidence Code and testified that he was secretary and treasurer of the Hotel Art Station, a corporation, and owned fifty per cent of its stock; that it owed plaintiff \$100.00. He further testified that the Hotel Art Station was into business, and that the defendant had been in the city for some time. The record then discloses that there was some discussion between court and counsel as to whether they would

try the attachment issue first, and it apparently was decided to hear the merits of the case first. The court then said: "So far it shows that the corporation (the Metal Art Studios) was liable. Why should they sue this man? That is what I want to know." The witness was then shown what purported to be the written guaranty upon which ^{plaintiff} based his suit. He testified that he did not write the document; that he did not dictate it; that "I think it was dictated by Mr. Scharfman," his bookkeeper - the bookkeeper of the Metal Art Studios; that he did not sign his name to the document, but that witness' name was signed to it by the bookkeeper; "I authorized him to sign my name. He signs it to quite a bit of my correspondence." The document which plaintiff contends was the written guaranty was on the letterhead of the Metal Art Studios, dated July 28, 1926, addressed to the plaintiff, and is as follows:

"Dear Sir: Att. L. L. VanSchaack.

I have been informed that you have asked for my personal guarantee on the account of the Metal Arts Studios, and this is to assure you that I have no hesitancy in guaranteeing this account.

It is true that we have been very slow in payment, but conditions are rapidly improving and it is now only a short time longer before we will pay up our account with you.

We thank you for your kind consideration and cooperation in this matter, and assure you that we shall make an earnest endeavor to take care of this account in the very near future.

Yours very truly,

J. B. Ehrlich,

Metal Arts Studios."

The witness further testified that he did not know whether \$200 of merchandise had been sent by the plaintiff to the Metal Art Studios after the date of the guaranty, but he knew that some merchandise had been shipped by plaintiff to the Metal Art Studios. He further testified that he did not authorize the bookkeeper to sign his name to the document; that the bookkeeper wrote the document in response to a letter from plaintiff but did not inform him what the letter contained. The witness further testified that he had not talked over the telephone with Van Schaack; that Scharfman had been with the Metal Art Studios for

...the document is not true, and it apparently was decided to
have the matter of the case tried. The court then said: "The
it shows that the correspondence (the hotel and studios) was fictitious.
Why should they use this name? That is what I want to know." The
witness was then shown what purported to be the witness' signature
upon which passed his suit. He testified that he did not write
the document; that he did not dictate it; that "I think it was
dictated by Mr. [redacted], his bookkeeper." The bookkeeper of
the Hotel Arts Studios; that he did not sign his name to the
document, but that witness' name was signed to it by the bookkeeper;
"I authorized him to sign my name. He signs it to quite a bit of
my correspondence." The document which plaintiff contends was the
written authority was on the letterhead of the Hotel Arts Studios,
dated July 25, 1935, addressed to the plaintiff, and is as follows:
"Dear Sir:
and I have been informed that you have asked for my personal
signature on the account of the Hotel Arts Studios, and this
is to assure you that I have no objection in recommending this
account.
It is true that we have been very slow in payment, but
conditions are rapidly improving and it is now only a short
time longer before we will pay up our account with you.
We thank you for your kind consideration and cooperation
in this matter, and assure you that we shall make an extra-
ordinary effort to take care of this account in the very near future.
Yours very truly,
J. R. [redacted],
Hotel Arts Studios."

The witness further testified that he did not know
whether \$500 of merchandise had been sent by the plaintiff to the
Hotel Arts Studios at the date of the document, but he knew that
some merchandise had been shipped by plaintiff to the Hotel Arts
Studios. He further testified that he did not authorize the
bookkeeper to sign his name to the document; that the bookkeeper
wrote the document in response to a letter from plaintiff but did
not deliver him what the letter contained. The witness further
testified that he had not talked over the telephone with [redacted]
[redacted]; that [redacted] had been with the Hotel Arts Studios for

about a year and a half and that "he signed my name very often; that was the usual and customary thing to be done in my office;" that he did not authorize Scharfman to sign the guaranty in question.

Van Schanck called on behalf of the plaintiff, testified that he was secretary and treasurer of the plaintiff company; that he received the written guaranty through the mails in reply to a letter which he sent the Metal Art Studios; that he also had a telephone conversation shortly before the date of the guaranty; that he called up the Metal Art Studios and talked to one who said he was Ehrich; that the witness explained to him that plaintiff was not willing to sell the Metal Art Studios any more goods on credit because their account was then overdue, but that plaintiff would be willing to extend further credit if Ehrich would personally guarantee the account; that Ehrich answered that he would have no objection to guaranteeing the account and for plaintiff to write a letter to Ehrich, which the witness did; that he was familiar with Ehrich's voice; that afterwards Ehrich was pointed out to him at a luncheon at the Drake Hotel and the witness there heard him talk. On motion this testimony was erroneously stricken. He further testified that the man he heard speak at the hotel was the same man he talked to over the telephone. Upon objection this also was erroneously stricken. The witness then testified that about two days prior to the date of the guaranty he again called up the Metal Art Studios, asked for Mr. Ehrich, and that some one answered, stating that it was Ehrich speaking; that it was the same voice he had previously heard over the telephone; that witness stated that he was holding up the Metal Art Studios order for goods and would not fill its order until they had received the letter of guaranty; that Ehrich replied that he would mail it within a day or two, and then the goods were sent. The witness was then asked if he recognized this voice as being that of Ehrich. Objection to this

question was sustained. The objection should have been over-ruled. In this case, where the evidence is highly conflicting, considerable latitude should have been given by the court to the admission of evidence; the evidence above mentioned which was stricken out by the court was clearly admissible.

Counsel for the defendant contends that in construing a written contract of guaranty, the guarantor is a "favored child of the law." We are unable to agree with this contention. It has been held that the weight of authority is in favor of construing a contract of guaranty at least as favorably to the creditor as other written contracts. Fausseg v. Reid, 145 Ill. 488. And especially should this rule be applied in the instant case where the guarantor was the Secretary and Treasurer of the debtor and owned fifty per cent of the stock of the debtor corporation.

For the error in ruling on the evidence above referred to, the judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McGurely, J., concur.

question was material. The objection should have been overruled.
In this case, where the evidence is highly conflicting, considering
this fact should have been given by the court to the admission
of evidence; the evidence above mentioned which was excluded not
by the court was clearly admissible.

Counsel for the defendant contends that in construing
a written contract of guaranty, the guarantor is a "favored child
of the law." We are unable to agree with this contention. It has
been held that the weight of authority is in favor of construing
a contract of guaranty as least as favorable to the creditor as
other written contracts. *Wells v. Wells*, 245 Ill. 488. And
especially in this case we applied in the instant case
where the guarantor was the secretary and treasurer of the debtor
and owned fifty per cent of the stock of the debtor corporation.
For the error in ruling on the evidence above referred
to, the judgment of the Municipal Court of Chicago is reversed and
the cause remanded.

REVEREND AND HONORABLE

Respectfully,
Submitted, P. J. and Attorney, "C. C. C."

248 T.A. 639

359-32300

JULIA MC KAY,
Appellee,

vs.

HILLMAN'S, A CORPORATION,
Appellant.

}
Appeal from
Superior Court
Cook County
}

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages for personal injuries. There was a verdict ^{her} and judgment in favor for \$2,000.00 and the defendant appeals.

The record discloses that about 9:45 A.M. of April 20, 1926 plaintiff with one of her small children was shopping in defendant's retail store in Chicago and as she was walking toward the elevator she fell and injured her right foot and it is to recover damages for this injury that she sues. The defendant contends that there was no evidence of negligence on its part and that, therefore, there should have been a directed verdict at the close of all the evidence in its favor.

The declaration was in two counts. The first in substance charged that the defendant conducted a retail store at State and Washington Streets, Chicago and that it was its duty to keep the premises in a reasonable and safe condition for those ^{making} purchases of its goods; that plaintiff was in the store shopping at the time; that the defendant did not keep that portion of the building in which she was shopping in a reasonable and safe condition, but that the defendant was negligent in that the floor was uneven; that the place was

Appeal from
Superior Court
Cook County

WILLIAM T. O'BONOR, Plaintiff,
vs.
WILLIAM T. O'BONOR, Defendant.

MR. JUSTICE O'BONOR DELIVERED THE OPINION OF THE COURT.
Plaintiff brought suit against the defendant in
tortious damages for personal injuries. There was a verdict
and judgment in favor for \$5,000.00 and the defendant appeals.
The record discloses that about 8:45 A.M. of April
22, 1936 plaintiff with one of her small children was shopping
in defendant's retail store in Chicago and as she was walking
toward the elevator she fell and injured her right foot and
it is to recover damages for this injury that she sues. The
defendant contends that there was no evidence of negligence
on its part and that, therefore, there should have been a
directed verdict at the close of all the evidence in its
favor.

The defendant was in two counts. The first in
substance charged that the defendant conducted a retail store
at State and Washington Streets, Chicago and that it was its
duty to keep its premises in a reasonable and safe condition
for the convenience of its goods; that plaintiff was in the
store shopping at the time; that the defendant did not keep
that portion of the building in which she was shopping in a
reasonable and safe condition, but that the defendant was
negligent in that the floor was uneven; that the place was

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dark and while she was in the exercise of due care for her own safety and purchasing some of defendant's merchandise, she walked upon the uneven portion of defendant's floor and "unavoidably caught her foot on one of the said portions extending ^{upward} ***and thereby then and there fell." The second count was to the same effect, except that it charged that plaintiff "slipped and fell" and was injured.

The evidence shows that plaintiff was walking west between counters upon which there was merchandise; that the floor sloped down toward the west; that she fell against one of the counters and then slipped down; that she was then assisted to a chair nearby where she complained of injury to her foot; that afterwards she went home with her husband in their automobile. An X-Ray showed a "fracture of the fifth metatarsal at its proximal extremity near the tarsal articulation" which means that the big bone of the little toe was broken. She was laid up several weeks and suffered a great deal of pain.

She testified that on the day in question she went to the third floor of the defendant's store and made some purchases. This was about nine o'clock in the morning; that after waiting for her change "and I just walked away and fell, - fell against the counter" and that then she slid on and slipped down and hit the floor and one of the defendant's employees came; that she was taken to a chair nearby and given a glass of water. Her six year old boy was with her. That as she sat on the chair she said to the man who had assisted her that it was no wonder she fell, for him to look at the floor where she had fallen; that the edge of the linoleum was ragged; that there was a space worn about the size of her hand; that she was

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walking west at the time of the accident between two counters and that the floor sloped down toward the west; that the decline was about a couple of inches; that the place was not well lighted, the nearest light being about 25 feet away.

Plaintiff's husband testified that they drove to defendant's store that morning in their automobile and he waited outside in the street while his wife went to shop; that sometime afterward he saw her coming out of the building and that she was nearly crawling across the street and seemed to be injured; that he ran and helped her in the car; that she had told him what occurred and then he went to the third floor of Hillman's and saw the floor walker there; that they looked around the place where she fell; that they examined the floor; that there was a slope going down; that there was a hole in the linoleum about the size of his hand, about one-sixteenth of an inch deep; and that it seemed to be verified that there was a sort of spring to it when he stepped on it.

The evidence further tends to show that the floor where plaintiff was injured declined toward the west about one and one-half inches to the foot and that this floor was about fifty-four inches in length. There was no evidence that plaintiff caught her feet in the floor and fell as she alleged in the first count of the declaration. Nor was there any evidence that she slipped and fell as alleged in the second count. The only evidence of negligence on the part of the defendant was that the place where plaintiff was injured was not well lighted; that the floor sloped down toward the west.

relating to the time of the accident between the defendant

and the fact that the defendant does not know the exact time of the

accident and that a number of persons saw the accident and that

the defendant was not present at the time of the accident.

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And that the covering of the floor was worn and somewhat uneven, but we are unable to find any evidence from which it might be reasonably inferred that plaintiff was injured on account of the lack of proper lighting or of any defect in the surface of the flooring.

Upon a careful consideration of all the evidence in the record, we are of the opinion that all reasonable minds would reach the conclusion that there was no evidence, viewing it in the light most favorable to the plaintiff, from which the jury might reasonably infer that plaintiff was injured through the negligence of the defendant, and therefore, the question was one of law for the court and a verdict in favor of the defendant should have been directed as requested.

Where the evidence is such as to justify a directed verdict because the evidence does not tend to establish a cause of action, but the directed verdict is refused, this court may reverse the judgment with a finding of fact without remanding the cause. Miron v. Ferschner Contracting Co. 312 Ill. 343.

The judgment of the Superior Court of Cook County is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact there was no evidence tending to show that the defendant was guilty of any negligence.

MATCHETT, P. J. AND MC SURELY, J. CONCUR.

WOLFE COAL SAVER COMPANY,
a Corporation,
Appellant,
vs.
HOUSTON PORTER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$650 claimed to be due it from defendant for three "coal saving devices" installed by plaintiff in defendant's premises. The jury found the license against the plaintiff and its appeals.

The record discloses that plaintiff and defendant entered into three written contracts which provided that plaintiff should install in defendant's premises three "coal saving devices" for which plaintiff was to receive \$650; that the devices were installed but defendant claimed they did not save coal as the contracts provided. The contracts were to the effect that the coal saving device would save not less than 20 per cent of the fuel. The verdict of the jury was rendered on March 7, 1927, and on the same date judgment was entered on the verdict.

The record discloses that there was no motion for a new trial, nor was there any appeal prayed for at the time the judgment was entered. It further appears that after the verdict and judgment on March 7th nothing was done until March 19th, when plaintiff moved the court to vacate the judgment and for a new trial. The motion was set for March 26th and on the latter date it was postponed until April 9th, when the motion was over-ruled. Plaintiff then prayed and was allowed an appeal to this court. In support of plaintiff's motion to vacate the judgment and for a new trial, it submitted an affidavit of Alton Baird in which he swears that on

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April 8, 1927, after the trial of the case he went to 4842 Evans avenue between nine and nine-thirty o'clock in the morning and inspected the boiler room and furnace and there saw one of the coal saving devices in question; that it was connected up with the furnace and was then being used by the defendant. He further swears that on March 7, 1927, which was the date of the trial, he went to the same premises and saw the device in operation; that he inspected the furnace at No. 4139 Prairie avenue, which was owned by the defendant, and there found that one of the coal saving devices involved in the instant case was being used. This is all that was advanced in support of plaintiff's motion to vacate the judgment. Obviously this was entirely insufficient. If the facts set up in the affidavit might be considered pertinent, there is no showing as to why they could not have been adduced on the trial. It is clear that we would not be warranted in saying that the trial Judge abused his discretion in denying plaintiff's motion to vacate the judgment. But even if the points urged by plaintiff were open for our consideration, we think the judgment ought not to be disturbed.

Complaint is made of a number of instructions given by the court and which it is said were prejudicial to the plaintiff. The charge of the court to the jury was oral; no objections were pointed out at the time and they are therefore not saved on this appeal. It was a controverted question of fact whether the coal saving devices saved 20 per cent of the fuel and worked properly as the contracts provided. The jury found in favor of the defendant, and upon careful consideration of all the evidence we are of the opinion that we would not be warranted in holding that its finding was against the manifest weight of the evidence. Its finding was approved by the trial Judge. The jury and the trial Judge saw and heard the witnesses testify and were

in a much better position to determine the truth of the matter than we are by a reading of the printed page.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Hatchett, W. J., and McGuire, J., concur.

ALBERT KANISKA, a minor, by
his next friend, EMILY KANISKA,
Appellant,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellees.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, a child of about three years of age, by his mother and next friend, brought suit to recover for injuries claimed to have been sustained by him by being struck and injured by one of defendants' street cars. At the close of the plaintiff's case the court, at the request of the defendants, instructed the jury to return a verdict in defendants' favor, which was accordingly done, judgment was entered on the verdict and plaintiff appeals.

The record discloses that on the afternoon of May 7, 1926, plaintiff accompanied his father to a store located on the north side of Archer avenue, which at the place in question runs in an easterly and westerly direction in Chicago, where the father went to buy some paint; that while the father was thus engaged plaintiff left the store and went into the street; his father discovered this and ran after him and overtook him, when a west bound street car struck and injured the child. It further appears from the evidence that the store where plaintiff's father went to buy paint was located between Knox avenue on the east and Kilpatrick avenue on the west; that the next street immediately west of the last named street was Keating avenue; that a railroad runs north and south about 100 feet east of Knox avenue, and that between the railroad track and Keating avenue there were but three buildings, two on the north side of Archer avenue between Knox

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avenue and Kilpatrick avenue, and one on the south side of Archer avenue between Kilpatrick and Yeating avenues; that the two buildings on the north side were about 75 feet apart, the one to the east being the store above mentioned. The evidence further tends to show that the street car stopped at the railroad crossing and then started up and witnesses testified that as it was passing the paint store it was going "fast;" that plaintiff was struck by the car about opposite the paint store and that the street car ran about seventy-five to one hundred feet before it stopped. There is other evidence tending to show that there were some boys near the paint store, the front of which was 25 feet from the north rail of the west bound street car track.

Since plaintiff was under seven years of age, he was incapable of being guilty of negligence. Kushaliunas v. C. & N. E. R. Co., 318 Ill. 148. So that the only question to be determined in this case is whether there was any evidence from which the jury might reasonably find the street car company was negligent in the operation of the car at the time in question. Libby, McNeill & Libby v. Cook, 232 Ill. 306.

Counsel for the defendants in their brief state that "in order to make out a case, the plaintiff must show by legitimate evidence, sufficient to sustain a finding by the jury, that at the time the danger became apparent in the exercise of ordinary care, the car was a sufficient distance from the place of the accident to enable the motorman in the exercise of due care to bring it to a stop." We think this is not a correct statement of the law. In a personal injury case where the evidence offered tends to prove the cause of action set out in the declaration, the case should not be taken from the jury, although the trial judge was of the opinion that in case there was a verdict for the plaintiff, it would be his duty to set it aside. Libby, McNeill & Libby

v. Cook, supra.

Upon a careful consideration of all the evidence in the record, we are of the opinion that whether the street car was being operated with due care in the circumstances should have been submitted to the jury.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, F. J., and McSurely, J., concur.

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Reed, W. J., and Reed, J. J., 1. 1. 1.

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BERNARD ROLL, EARL BAUER, MORTHA
PIENNASIE, LIBBY CONNOLD, RUBIN SINGEL,
HYMAN METTRICH, JOSEPH SATF, SAM STEIN,
HARRY NEILL, JACOB BERGER, GEORGE ASPIS,
LOUIS MYROCHNIK, MIRNIE KAPLAN, STEFANIA
PLONKA, WALTER BISCUIK, MARTHA BRZOSOWSKI,
ISADORA SCOLNICK, HARRY WALLACE, PHILIP
HAUSER, SARA NOVITZ, VERA DOBROW, IDA
ROTHSTEIN, SOLOMON COHEN, JOSEPH PODENHART,
A. SCHROTE, LOUIS BROOKS, JOEL LEVIN, IRVING
L. DAVIDSON, BARRY SEFT and ROY GLAZERMAN,
Appellants.

Appeal From Order
of Superior Court
Denying Motion to
Dissolve Temporary
Injunction.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On November 7, 1987, the defendants' motion to dissolve an order awarding a temporary injunction was denied and the defendants have taken this statutory appeal.

The record discloses that on August 30, 1937, complainants, who allege that they are the duly authorized and elected officials of the Chicago Joint Board of certain local unions of the International Garment Workers Union, filed their bill in their own behalf and on behalf of the members of such Union, seeking to restrain the defendants from interfering with complainants in the discharge of their duties as officials of the Joint board. A preliminary injunction was asked, notice having been given to the defendants that such application would be made; August 31st the motion came on for hearing, and all parties being represented an order was entered restraining the defendants. The matter was heard upon verified bill and affidavits filed by complainants. On September 28th the defendants filed their answer and on September 29th filed their motion to dissolve the temporary restraining order; so far as appears in the record, the motion was not called up until November 7th, when an order was entered denying the defendants'

motion to dissolve the temporary injunction.

The allegations of the bill in brief compass are: that on August 3, 1927, complainants were duly elected officers of the Chicago Joint Board of the Garment Workers Union and were duly installed in office on August 11, 1927, in conformity with the rules of the constitution and by-laws of the order; that the defendants were the retiring or out-going officers of the Chicago Joint Board and on August 12th and 15th complainants requested them to make a final report of their accounts and to turn over to the complainants the property of the Joint Board, as required by the constitution and by-laws, but that the defendants refused so to do, and that because of such failure and refusal complainants were seriously hampered in the performance of their duties; that the Joint Board had on deposit in a Chicago bank \$15,450.84 which was used for the payment of current salaries and expenses of the Joint Board from time to time; that the organization had a safety deposit box in Chicago, in which were placed various securities belonging to the Joint Board; that although the defendants knew that they would soon be out of office, they conspired together to prevent and hamper complainants in the discharge of their official duties, in that they served notice on the bank in which the funds were deposited, wherein they stated that they were the officers of the Joint Board; that there was then in progress a pretended election of new officers which was not being properly held, and the bank was notified not to recognize the new board of officers which shortly thereafter would claim to be the proper officials of the organization, and not to pay out any money on complainants' order; that they also gave a notice to the Safety Deposit company to the same effect; that the defendants in furtherance of the conspiracy were holding themselves out to the members of the local union as officials of the Joint Board and under such pretences were

collecting and seeking to collect dues from the members of the organization, and it was alleged that such dues should be paid to complainants as the duly constituted officers; that the defendants were printing and circulating pamphlets of a scurrilous character, attacking the complainants; that they were picketing the officer of the organization located at No. 327 West VanBuren street, and distributing printed circulars wherein it was stated that complainants should receive no recognition from the members of the Union, as they were ^afake board. There are other allegations which it is not necessary to mention here.

The prayer of the bill was that a temporary injunction issue immediately restraining the defendants from soliciting or inducing any person not to do business with the complainants; that they be restrained from soliciting members to pay dues to defendants; from distributing pamphlets above mentioned; from using the name Chicago Joint Board or claiming to be officials of the organization; from interfering with the conduct of the officers of the Joint Board as administrated by the complainants; from interfering with the withdrawal of funds on deposit in the bank and the securities in the deposit box. A further prayer was made that the court determine and adjudicate that the funds in the bank and the securities in the safety deposit box belong to the Joint Board of the organization, and that the complainants were lawfully entitled to withdraw such funds and to the custody of the contents of the safety deposit box; that the defendants be enjoined from holding themselves out as officers of the Chicago Joint Board, and for general relief. Attached to and made a part of the bill was a copy of the constitution and by-laws of the organization. The affidavits filed in support of the bill tended to support the charges made in the bill.

In their answer the defendants denied that the com-

plaintiffs were the duly elected officers of the Chicago Joint Board, but on the contrary averred that in the month of February, 1927, certain defendants "were duly elected and installed as Joint Board delegates" of certain local unions (naming them); that certain named defendants were by referendum vote of all the members of the local unions duly elected as business agents of the local unions mentioned, to serve as such business agents until March 1, 1928. The answer denied that any valid election had been held August 6, 1927, or at any other time since February, 1927, but on the contrary that on August 4, 1927, a purported election of officers was held by one of the locals involved; that the control of the elections was wrongfully taken away from the officers and members of the local unions by a committee of the general executive board of the International Ladies Garment Workers Union, contrary to the constitution. Further allegations are to the effect that complainants were not the properly elected officers, but that through threats or force they unlawfully seized possession of the organization's headquarters No. 327 West VanBuren street. There were further matters set up in the answer which we think it unnecessary to mention here because we think it sufficient to say that the vital question in the case is as to whether complainants were the duly elected officers as they claim.

The defendants contend that a court of chancery was without power to enter the order awarding the writ of injunction because no property rights were involved, and that courts have no power to pass upon the question of differences between contending factions of a voluntary association except to protect some property right. The contention that the court had no jurisdiction is without merit, because it is clear that property rights are involved - money is in the bank, securities in the safety deposit box, dues are being collected - and it is obvious that the court had jurisdiction.

Whether the complainants are duly elected officers is a question for final determination by the chancellor when the evidence is heard.

We think the court was warranted under the allegations of the bill and the answer in entering the order complained of, and that it was not error to refuse to dissolve it. The motion to dissolve was not made until about a month after the order for the temporary injunction was entered, although the defendants were notified and in court when the order awarding the writ was made.

The order refusing to dissolve the injunction is affirmed.

AFFIRMED.

Hatchett, W. J., and McMurphy, J., concur.

1990

657 2/21/36 389⁵

JOHN H. HUNT,
Defendant in Error.

vs.

PETER LARGAS,
Plaintiff in Error.

ORDER TO DISMISS CASE
OF CHIEF JUSTICE.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries the jury returned a verdict for plaintiff with damages of \$6,300, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment.

The declaration alleged and the evidence tended to show that plaintiff was struck by an automobile driven by defendant and severely injured. One count charged wilful and wanton injury, but in response to a special interrogatory the jury replied that the automobile was not operated or driven wantonly or wilfully.

The errors assigned and argued are that the verdict is against the manifest weight of the evidence and that the court erred in refusing to give instructions requested by defendant.

There was evidence tending to show that the accident in question occurred on the night of February 15, 1935, at about 10:30 p. m. on North Robey street in Chicago. Robey street is a public highway extending north and south and is intersected by Rice and Iowa streets, which are public highways extending east and west. The evidence tends to show that defendant was driving his automobile on Robey street towards the south; that at the same time a northbound street car approached from the south; that plaintiff had been visiting friends who lived in a flat on the third floor of the northwest corner of Rice and Robey streets; that she

On the night of February 15, 1968, at approximately 10:30 p. m. on North Hoboy street in Chattanooga, Tennessee, a white male, approximately 30 years of age, 5'10" tall, 175 lbs., with dark hair and eyes, wearing a white shirt and dark trousers, was seen walking north and south and is interested by public at every crossing north and south and is interested by

left this flat intending to go north to Iowa street to catch this northbound car; that in doing so she hurried across Robey street when she saw the street car coming; that about the same time defendant's automobile approached from the north and struck her, inflicting the injuries for which she sues.

The testimony for the defendant tended to show that there were two automobiles standing along the west curb of Robey street, three or four houses from the corner of Nicol street, facing south, and that these automobiles were three or four feet apart; that plaintiff came out from behind these automobiles and ran east across Robey street to catch the car.

The defendant contends that the verdict is manifestly against the weight of the evidence and urges that plaintiff was guilty of contributory negligence which would bar her recovery. As the cause, however, must be tried again, we shall refrain from any discussion of the weight of evidence further than to say that the case is a very close one upon the facts, and defendant was entitled under these circumstances to have the jury accurately instructed as to the law applicable to the case.

The court refused to give the following instruction:

"The court instructs the jury that in considering the case the burden of proof is not upon the defendant to show that the driver of his car is not guilty of the negligence charged against him, but the burden is upon the plaintiff to prove by a preponderance of all the evidence that the defendant's driver is guilty of the negligence charged; that such negligence, if there was any, proximately caused the accident and that plaintiff herself was not guilty of any negligence which proximately contributed to the accident. This rule as to the burden of proof is binding in law and must govern the jury in deciding this case. The jury has no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict the jury should adhere strictly to said rule, and, if by that rule the plaintiff has failed to establish her case, then she may not recover under the counts of the declaration charging negligence."

Defendant contends that through the refusal of the court to give this instruction the jury was left without information as to vital features of the case, namely: (1) the burden of proof

Let's take first intention to go north on Iowa street to catch this
neighborhood car; that is going to the hospital across Highway street
when the car first was coming; that about the same time the
defendant's automobile approached from the north and struck her,
intentionally the intention for which the man.
The testimony for the defendant tended to show that

that was the intention of the defendant to go north on Iowa
street, three or four houses from the corner of his street, looking
south, and that there automobiles were three or four feet apart;
that plaintiff came out from behind these automobiles and ran east
across Highway street to catch the car.

The defendant contends that the verdict is manifestly
against the weight of the evidence and urges that plaintiff was
guilty of contributory negligence which would bar her recovery.
The cause, however, must be tried again, we shall retain from
any discussion of the weight of evidence further than to say that
the case is a very close one upon the facts, and defendant was
entitled under these circumstances to have the jury instructed
instructed as to the law applicable to the case.

The court refused to give the following instructions:
"The court instructs the jury that in considering the case
they should be guided by the fact that the defendant is not the
driver of the car is not guilty of the negligence charged against
him, but the burden is upon the plaintiff to prove by a preponder-
ance of all the evidence that the defendant's driver is guilty
of the negligence charged; that such negligence, if there was
any, proximately caused the accident and that plaintiff himself
was not guilty of any negligence which proximately contributed
to the accident. This rule as to the burden of proof is
in law and must govern the jury in deciding this case. The jury
has no right to disregard said rule or to accept any other in lieu
thereof, but in considering the evidence and coming to a verdict
the jury should adhere strictly to said rule, and, if by that
rule the plaintiff has failed to establish her case, then she
may not recover under the counts of the declaration charging
negligence."

The court refused to give the following instructions:
"It is the duty of the jury to weigh the evidence and to decide
as to what features of the case, namely: (1) the burden of proof

on the three ultimate facts necessary to establish liability; and (2) the necessity of a casual connection between defendant's negligence and the accident as a prerequisite of liability. Defendant calls attention to the fact that in Chicago Union Traction Co. v. Mee, 218 Ill. 9, a refusal by the court to give two instructions stating the law substantially as here was held to be error which required a reversal.

Without questioning the rules of law as set forth in the instruction, the plaintiff contends that by other instructions, namely, defendant's instructions Nos. 16, 17, 20 and 21, the principles announced were fully covered. Instruction No. 16, however, appears upon an examination to refer alone to the preponderance of the evidence and not to the burden of proof. Instruction No. 17 states the distinction between ordinary care and the highest degree of care. Instruction No. 20 also lays down the rule as to ordinary care, while instruction No. 21 defines the meaning of "proximately" as applied to the law of contributory negligence. It would appear, therefore, that these instructions do not cover the principles of law applicable either to the burden of proof or to the causal connection between a defendant's alleged negligence and the accident. We think the instruction should have been given.

Plaintiff also contends that the court erred in refusing to give a requested instruction marked "E", by which the jury was told:

"If you believe from the evidence that the plaintiff, by looking, could have seen the automobile approaching, but that she failed to look, and without looking walked or ran in front of said automobile, when it was but a few feet away from her, and if you further believe that such conduct on the part of the plaintiff, if you find she did so conduct herself, was negligence and proximately contributed in any degree to the happening of the accident, then the plaintiff may not recover under the counts of the declaration charging negligence."

While there were other instructions covering in an

on the issue of negligence is necessary to establish liability; and (2) the necessity of a causal connection between defendant's negligence and the accident as a prerequisite of liability. Defendant calls attention to the fact that in Chicago Union Traction Co. v. Heg, 218 Ill. 9, a refusal by the court to give two instructions stating the law substantially as here was held to be error which required a reversal.

Without questioning the rules of law as set forth in the instruction, the plaintiff contends that by other instructions, namely, defendant's instructions Nos. 16, 17, 20 and 21, the principles announced were fully covered. Instruction No. 16, however, appears upon an examination to refer alone to the preponderance of the evidence and not to the burden of proof. Instruction No. 17 states the distinction between ordinary care and the highest degree of care. Instruction No. 20 also lays down the rule as to ordinary care, while instruction No. 21 defines the meaning of "proximately" as applied to the law of contributory negligence. It would appear, therefore, that these instructions do not cover the principles of law applicable either to the burden of proof or to the causal connection between a defendant's alleged negligence and the accident. We think the instruction should have been given.

Plaintiff also contends that the court erred in refusing to give a requested instruction marked "B", by which the jury was told:

"If you believe from the evidence that the plaintiff, by looking, could have seen the automobile approaching, but that he failed to look, and without looking walked or ran in front of said automobile, when it was but a few feet away from her, and it was further believed that such conduct on the part of the plaintiff, if you find she did so without necessity, was negligence and proximately contributed in any degree to the happening of the accident, then the plaintiff may not recover under the counts of the declaration charging negligence."

While there were other instructions covering in an

abstract way the rules of law as to contributory negligence, there was none which undertook to apply directly and specifically the theory of the defendant to the facts which were made to appear by the evidence. While a defendant is not entitled to pick out every particular fact and have an instruction given based thereon (Jager v. Kessler, 218 Ill. App. 39; West Chicago S.R.Co. v. Lieserowitz, 197 Ill. 607), he is entitled to have instructions given which apply directly and specifically to his theory of facts which there is evidence tending to prove. (Carlin v. Grand Trunk Ry. Co., 243 Ill. 64; Thomas v. Chicago Embossing Co., 307 Ill. 134.)

Defendant also contends that the court erred in refusing to give a requested instruction as follows:

"The court instructs you that, in considering this case, you should not allow sympathy to influence you in any manner whatever, nor should you allow any appeals to your feelings to sway your judgment in any degree."

It is very difficult to conceive of a case of this character, where severe injury was sustained by a plaintiff, in which this instruction ought not to be given. There was no other instruction which covered this point, and we think the court erred in refusing to give it. Jones & Adams Co. v. George, 227 Ill. 64.

Defendant requested another instruction which told the jury:

"Even if you find from the evidence that Mr. Langas was at or immediately prior to the happening of the collision in question guilty of some of the negligence specifically charged against him, but was not guilty of wilfully or wantonly inflicting injury upon plaintiff, yet if you further find from the evidence that the plaintiff, Mrs. Blust, either at the time of or immediately before the happening of the collision, failed to exercise ordinary care for her own safety and that her failure to do so, if she did so fail, caused or proximately contributed to bring about the injury claimed by her, then she cannot recover in this case and the court further instructs you that under such circumstances, if you find such were the circumstances, you have no right to compare the negligence of Mr. Langas, if any, and the negligence of Mrs. Blust, if any, in order to determine which was guilty of the greater degree of negligence, but you should find the defendant not guilty."

absolutely way the rules of law as to contributory negligence, there was none which undertook to apply directly and specifically the theory of the defendant to the facts which were made to appear by the evidence. While a defendant is not entitled to pick out every portion of fact and have an instruction given based thereon (Langbein v. Langbein, 235 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Defendant also contends that the court erred in refusing to give a requested instruction as follows:

"The court instructs you that, in considering this case, you should not allow sympathy to influence you in any manner whatsoever, but should you allow your feelings to sway your judgment in any degree."

It is very difficult to conceive of a case of this character, where severe injury was sustained by a plaintiff, in which this instruction ought not to be given. There was no other instruction which covered this point, and we think the court erred in refusing to give it. Langbein v. Langbein, 235 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

the jury:

"When it is found from the evidence that Mr. Langbein was at or immediately prior to the happening of the collision in question guilty of some of the negligence specifically charged against him, but was not guilty of contributory negligence, then the jury should find that the plaintiff, Mr. Langbein, is entitled to recover at the time of or immediately before the happening of the collision, failed to exercise ordinary care for her own safety and that her failure to do so, if she did so, caused or proximately contributed to bring about the injury sustained by her, then the court should find that the plaintiff is entitled to recover in this case and the court should instruct you that under such circumstances, if you find such were the circumstances, you have no right to compare the negligence of Mr. Langbein, if any, and the negligence of Mrs. Langbein, if any, in order to determine which was guilty of the greater degree of negligence, but you should find the defendant not guilty."

This instruction was not covered by any other. It states the law applicable to the case and should, we think, have been given.

Defendant also contends that the court erred in refusing to give certain instructions informing the jury that either a general or a special verdict might be returned in its discretion. Section 79 of chapter 110 (Cahill's Rev. Stat. 1925); G. & S. W. Ry. Co. v. Dunleavy, 139 Ill. 132, are cited, construing the same, as well as Mumford v. Wardwell, 6 Wall. 426, 18 Law Ed. 756. We do not think the court erred in refusing these instructions for the reason, as pointed out by the attorney for plaintiff, that the terms of verdict as prepared and offered could only have proved confusing to the jury. The proper practice in such cases is pointed out in Enc. Pl. & Pr., vol. 22, p. 984.

For the errors indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

This instruction was not covered by any other. It states the law applicable to the case and should, we think, have been given.

Defendant also contends that the court erred in refusing to give certain instructions informing the jury that either a general or a special verdict might be returned in its discretion. Section 70 of chapter 110 (Smith's New Stat. 1925; C. & N. W. Stat. 1925, 1926, 1927, 1928, are cited, concerning the same,

as well as the instructions given in this case. In so far as the court erred in refusing these instructions for the reason, as pointed out by the attorney for plaintiff, that the instructions were not given in conformity with the law, we think the court was right. The instructions were not given in conformity with the law, and the court was right in refusing to give them.

The court also erred in refusing to give the instructions which were requested by the plaintiff. The instructions were requested by the plaintiff, and the court was right in refusing to give them.

It is the opinion of the court that the instructions requested by the plaintiff should have been given.

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656243 I.A. 640

HARRY M. SIMONS, Jr., a minor,
by HARRY M. SIMONS, Sr., his
Next Friend,

Plaintiff in Error,

vs.

GEORGE HOLLANDER and GUSTAVE
EVORY, Doing Business as
HOLLANDER & EVORY,

Defendants in Error.

SHIRLEY M. SIMONS, Plaintiff
in Error.

MR. JUSTICE J. M. HANCOCK

DELIVERED THE OPINION OF THE COURT.

The plaintiff, a minor, by his next friend brought suit and filed a declaration in which he alleged that the defendants on May 4, 1923, owned and operated a grocery and meat market in Chicago and had and used a combination meat and coffee grinder which they operated from time to time; that the grinder was attractive to children of tender years and tended to and did incite childish curiosity on their part; that the plaintiff was of the age of ten years and at and before the time of the accident was exercising ordinary care; that he resided a short distance from the place of business of the defendants and at the time in question was attracted by childish curiosity toward the grinder and was playing in and about it; that defendants carelessly and negligently failed to provide a covering or guard for the grinder to prevent children from having access to it and allowed and permitted the grinder to be in an open and exposed condition; that through this negligence the plaintiff, who was playing around the grinder and exercising ordinary care for his own safety, had his hand caught in the grinder and lost the fingers and thumb of his right hand and suffered great pain, etc.

Additional counts filed alleged that plaintiff on the day of the accident was upon defendants' premises by leave, license

018-4-74-25

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

DOI: 10.1002/for

and invitation and was attracted by childish curiosity to the grinder and thus injured.

The defendants filed a plea of not guilty. The cause was tried by jury and the plaintiff at the close of his evidence ^{for leave} made a motion to file an additional count, which was refused. Plaintiff having rested his case, defendants moved that the jury find the defendants not guilty, which motion was granted, and this writ of error has been sued out to reverse the judgment entered upon that verdict. It is urged for reversal that the court erred in giving a peremptory instruction and in denying plaintiff leave to amend his declaration at the close of his evidence.

The plaintiff testified that he was fourteen years of age on January 17, 1927; that on the date of the accident, May 4, 1923, he had been visiting his sister, Mrs. E. H. Smith, who was then the wife of one of the defendants; that Mrs. Smith took him and two of her children to the grocery and meat market at 47th and State streets; that they got there at about half past ten in the morning and that his sister left plaintiff and two of her children in the store and went to a hospital where another child was to be operated on.

The plaintiff said there were two doors in the store; that as you came in the front door straight in front of you was a combination meat and coffee grinder with vegetables and other stuff piled in baskets in front of it and an aisle back of it and back of that a cashier's cage; that on one side of the aisle back of the grinder was the grocery part of the store and the other side the meat market; that besides himself and the other two children, Mr. Hollander and Joe Every were there; that his sister came back about twelve o'clock; that while she was gone Joe Every asked the witness to get milk from the ice box and wait on customers who were buying seeds; that plaintiff did this several times; that when his sister came back there were quite a few people in the

and invitation and was associated by collision exclusively to the

defendant and the witness.

The defendant filed a plea of not guilty. The case

was tried by jury and the plaintiff at the close of his evidence

made a motion for leave

to call additional evidence, which was refused.

Plaintiff having rested his case, defendant moved that the jury

find the defendant not guilty, which motion was granted, and

this writ of error has been used not to reverse the judgment on-

ferred upon that verdict. It is urged for reversal that the court

erred in giving a supplementary instruction and in denying plaintiff

leave to amend his declaration at the close of his evidence.

The plaintiff testified that he was fourteen years

of age on January 17, 1927; that on the date of the accident, May

4, 1928, he had been visiting his sister, Mrs. E. H. Smith, who

was then the wife of one of the defendants; that Mrs. Smith took

him and two of her children to the grocery and meat market at

that and State streets; that they got there at about half past ten

in the morning and that his sister left plaintiff and two of her

children in the store and went to a hospital where another child

was to be operated on.

The plaintiff said there were two doors in the store;

that as he came in the front door straight in front of him was a

refrigerator case; and coffee grinder with vegetable and other stuff

lined in baskets in front of it and on each side of it and back of

that a cashier's cage; that on one side of the aisle back of the

grinder was the grocery part of the store and the other side the

meat market; that besides himself and the other two children, Mr.

William and the other two children, and his sister were there

about twenty minutes; that he saw the other two children and

William go out with their mother and that he saw the other two

children go out with their mother and that he saw the other two

store and Mr. Hollander asked her to weigh out and grind some coffee; that she weighed out the coffee and went over to grind it; that she turned the grinder but turned it the wrong way; that plaintiff told her that he would show her how to do it, but he turned it on the wrong way; that she "hollered to George, 'How do you work this thing?'" that he replied, "I am busy, call Joe;" that Joe came over and said, "This is the way to turn it;" that the sister then put the coffee in and plaintiff stepped over and put his hand on top of the meat side of the grinder and looked in and all of a sudden he felt his right hand sink; that there was no cover on this side of the grinder; that his sister then turned around and told him to take his hand out of the grinder, and he said he couldn't; that somebody then pulled it out and plaintiff fainted; that his fingers and thumb were all gone; that his right arm has withered and is thinner and smaller than the left arm. The witness said that he could not see into the top of the grinder from the ground but had to stand on his toes to look in; that he looked in because he wanted to see whether that side was going; that he did not know whether or not it was going; that he did not see any cover for the meat side of the grinder.

In response to questions by the court the witness stated that his sister was at the machine at the time and he was standing right beside her.

On cross-examination plaintiff said that he had come over to the store with his sister and was in her care; that he did not look to her for directions as to what he was to do; that he had gone to her house to visit her; that his mother asked him if he wanted to stay at his sister's that night, and he said "yes;" that his sister left him at the store until she came back.

Mrs. E. R. Smith testified she left the machine

story and Mr. Hollander asked her to weigh out and grind some coffee; that she weighed out the coffee and went over to grind it; that she turned the grinder but turned it the wrong way; that plaintiff told her that he would show her how to do it, but he turned it on the wrong way; that she "believed" to George, "How do you work this thing?" that he replied, "I can't say, call Joe"; that Joe came over and said, "This is the way to turn it"; that the sister then put the coffee in and plaintiff stepped over and put his hand on top of the meat side of the grinder and looking in and all of a sudden he felt his right hand sink; that there was no cover on this side of the grinder; that his sister then turned around and told him to take his hand out of the grinder, and he said he couldn't; that somebody then walked in and plaintiff testified that his fingers and thumb were all gone; that his right arm was withered and he couldn't see anything but the left arm. The witness said that he could not see into the top of the grinder from the ground but had to stand on his toes to look in; that he looked in because he wanted to see whether that side was going; that he did not know whether or not it was going; that he did not see any cover for the meat side of the grinder.

In response to questions by the court the witness stated that his sister was at the machine at the time and he was standing right beside her.

On cross-examination plaintiff said that he had come over to the store with his sister and was in her room; that he did not look at her for directions as to what he was to do; that he did not know in what way the machine was to be used; that he would be glad to see the machine and would be glad to see that his sister was in the room with him.

Mr. E. M. Smith testified that he was in the room at the time.

it was about noon time; that it was quite busy in the store; that she had been in the habit of going down there to help; that Mr. Hollander asked her to wait on some girls who wanted coffee; that she weighed out the coffee for them; that she went over to the grinder and put the coffee in; that she could not make the switch work; that she called to Mr. Hollander to ask how to turn it on; that she thought he didn't answer; that Mr. Every was at the meat block cutting up meat, and he said, "I will turn it on;" that just before he said that the plaintiff went over to it and said, "I will turn it on;" that he fiddled with the switch but did not turn it on, so Mr. Every came over and started it; that she had just turned around to ask the girls what else they wanted when this took place; that when she turned back she noticed Harry with his hand in the grinder; that she said, "Take your hand out," that he said "I cannot;" that she pulled on his arm but she could not do anything with it; that she got scared and screamed; that the meat grinder came about to Harry's shoulders; that he was then ten years old; that by standing on his tip-toes his eyes came just to the top of the machine.

On cross-examination she testified that plaintiff was playing around the machine and that the action must have taken place when she turned her back; that plaintiff came over when she asked to turn the grinder on; that Mr. Hollander was busy in the store when she called to him and asked him to turn it on; that in fact she did not ask anybody to turn it on, but said, "How do you turn it on?" that Harry then ran over there; that it was Joe who turned it on; that she did not see what happened when she turned her back.

The original counts were based on the theory that the defendants were liable because the grinder was an attractive nuisance, and it is urged that the instruction to find ^{for} the defendants was proper on the authority of Peavars v. Jacobucci, 239

It was about noon time; that it was quite busy in the street; that she had been in the habit of going down there to help; that Mr. Hollister asked her to wait on some girls who wanted clothes; that she refused and the clothes for them; that she went over to the printer and met the clothes in; that she would not make the clothes; that she called to Mr. Hollister to ask how to turn it on; that she thought he didn't answer; that Mr. Hollister was at the door; that she called up next, and he said, "I will turn it on; that just before he said that the printer's went over to it and said, "I will turn it on; that he looked with the printer but did not turn it on, so Mr. Hollister came over and started it; that she had just asked around to ask the girls what else they wanted when this took place; that when she turned back she noticed Mr. Hollister with his hand in the printer; that she said, "Take your hand out," that he said "I cannot;" that she smiled on his arm but she could not do anything with it; that she got excited and returned; that the next printer came about to Harry's shop; that he was then ten years old; that by standing on his tip-toes his eyes came just to the top of the machine.

On cross-examination she testified that plaintiff was giving around the machine and that the motion must have taken place when she turned her back; that plaintiff came over when she asked to turn the printer on; that Mr. Hollister was busy in the store when she called to him and asked him to turn it on; that in fact she did not ask anybody to turn it on, but said, "How do you turn it on?" that Harry then ran over there; that it was Joe who turned it on; that she did not see what happened when she turned

The original counts were based on the theory that the

defendants were liable because the printer was an attractive

for

unlabeled, and it is urged that the instruction to the jury

defendants was proper on the authority of Lawrence v. Lawrence, 100

Ill. App. 543. In that case we held that a defendant owner of a machine similar to the one which was used by these defendants was not liable on the theory of an attractive nuisance to a child who had been ordered away from the machine but who went behind the counter and passed a meat barrel in order to get to it and was thereby injured. We held the defendant was not liable upon that theory, and we adhere to that decision.

The plaintiff there had been ordered to keep away from the machine. The plaintiff here had an express invitation from an employee to work in the store and about the machine, which invitation a jury might have found to be with the knowledge and acquiescence of the defendants.

At the close of his evidence plaintiff asked leave to file an amended count alleging liability not upon the theory of an attractive nuisance amounting to an implied invitation, but upon the theory that plaintiff was present by an express invitation. There are well considered cases holding that the owner of premises may be liable under such circumstances. Ramsay v. Tuthill Material Co., 295 Ill. 395.

The proof submitted was sufficient to raise a question for the jury on this theory; the statute of amendments and joinders permits amendments to the pleadings (see Ill. Rev. Stat. chap. 7, sec. 1), and we think the court erred in denying plaintiff's motion for leave to file an additional count conforming to the proof.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

111. App. 885. In that case we held that a defendant owner of a machine similar to the one which was used by these defendants was not liable on the theory of an attractive nuisance to a child who had been ordered away from the machine but who went behind the counter and passed a metal bar in order to get to it and was thereby injured. We held the defendant was not liable upon that theory, and we adhere to that decision.

112. The plaintiff there had been ordered to keep away from the machine. The plaintiff here had an express invitation from an employee to work in the store and about the machine, which invitation a jury might have found to be with the knowledge and acquiescence of the defendant.

113. At the close of his evidence plaintiff asked leave to file an additional count alleging liability not upon the theory of an attractive nuisance amounting to an implied invitation, but upon the theory that plaintiff was present by an express invitation. There are well considered cases holding that the owner of premises may be liable under such circumstances. Restatement (Tort) § 339.

The court submitted was sufficient to raise a question for the jury on this theory; the statute of amendments and practice permits amendments to the pleadings (see 111. App. 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

The cause remanded.

114. Restatement (Tort) § 339.

6569 ² 840

CARRIE E. LA CLOCHE, Administratrix
of the Estate of ROBERT HEBENSTREIT,
Deceased,

Appellee,

vs.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE KATCHETT
DELIVERED THE OPINION OF THE COURT.

This was an action on the case by the administratrix to recover damages for the benefit of the next of kin on account of the death of Robert Hebenstreit. There was a declaration in four counts, a plea of not guilty, a trial by jury, and at the close of all the evidence a motion by the defendant for an instructed verdict in its favor, which was denied. Thereupon the jury returned a verdict for the plaintiff in the sum of \$10,000, upon which the court, over-ruling motions for a new trial and in arrest, entered judgment.

The defendant urges that it was error for the court to deny its motion for a directed verdict. The declaration charged negligence in that defendant failed to keep a sidewalk on the south side of West Harrison street between Plymouth court and South Dearborn street in safe condition, in allowing the girders, beams and foundation which supported the sidewalk to be and remain out of repair, in failing to properly construct and equip the same, and negligence generally with relation thereto, because of which the sidewalk fell and plaintiff's intestate received injuries from which he died.

There was evidence tending to show that on January 21, 1926, at about 5:10 p. m., the intestate was walking upon this side-

BARRETT, J. A. BROOKS, Administrator of the Estate of ROBERT HENRY WHITE

Appellee

ATTEST: JOHN J. HENRY, CLERK

IN AND FOR SOUTHERN DISTRICT

CITY OF CHICAGO, a Municipality

Appellant

MR. JUSTICE DELANEY, MR. JUSTICE HENRY, MR. JUSTICE WHITE, MR. JUSTICE BROWN, MR. JUSTICE CARROLL, MR. JUSTICE CLARK, MR. JUSTICE CONNOR, MR. JUSTICE FLETCHER, MR. JUSTICE GIBSON, MR. JUSTICE HARRIS, MR. JUSTICE HENRY, MR. JUSTICE KANE, MR. JUSTICE LEE, MR. JUSTICE MCGONIGLE, MR. JUSTICE MURPHY, MR. JUSTICE NICHOLS, MR. JUSTICE O'BRIEN, MR. JUSTICE PETERSON, MR. JUSTICE QUINN, MR. JUSTICE RYAN, MR. JUSTICE SULLIVAN, MR. JUSTICE TAYLOR, MR. JUSTICE THOMAS, MR. JUSTICE WATSON, MR. JUSTICE WELLS, MR. JUSTICE WILSON, MR. JUSTICE WOOD, MR. JUSTICE YOUNG

REVEREND THE CHURCH OF THE SOUTH

This was an action on the case by the administrator

is proper damages for the benefit of the next of kin on account

of the death of Robert Henry White. There was a decision in

four counts, a plea of not guilty, a trial by jury, and at the

close of all the evidence a motion by the defendant for an

acres of land in the city of Chicago, which was denied. Thereupon the

jury returned a verdict for the plaintiff in the sum of \$10,000.

was then the court, overruling motions for a new trial and in

arrest, entered judgment.

The defendant urges that it was error for the court to

deny its motion for a directed verdict. The defendant charged

negligence in that defendant failed to keep a sidewalk on the

south side of West Main street between Plymouth street and

South Dearborn street in safe condition, in all winter the sidewalk

boards and foundation which supported the sidewalk to be and remain

out of repair, in failing to properly construct and equip the same

and negligence generally with relation thereto, because of which

the plaintiff fell and plaintiff's intestate received injuries from

which he died.

There was evidence tending to show that on January 21,

1926, at about 8:10 p. m., the intestate was walking upon this sidewalk

walk, which consisted of limestone slabs extending from the curb on the north to about four feet from the building line on the south; that south of these slabs there was a four-foot prismatic light extending from the slabs to the building line; that while the intestate with a companion was thus passing over one of the slabs it collapsed and the deceased was thrown into the basement, his head and the upper portion of his body being crushed, resulting in his death.

The body was released by a company of the City Fire Department which used jacks and blocks to pry up the portions of the broken stone slab. This slab was of limestone, about eight inches thick, ten feet two inches long, and about five feet six inches in width. It rested at the south end on an I-beam and at the north end was supported by the retaining wall of the street. There were no other supports between the beam and the curb.

The evidence also showed that there was a coal hole in the slab and that this coal hole was about two and a half feet in diameter; that the I-beam was rusted and corroded, and that the slab to the west of the one which broke tilted down.

There was also evidence tending to show that this particular sidewalk was more than twenty years old, and there was some evidence to the effect that there were cracks in the slab months prior to the time when it broke. The evidence also tended to show that the use of these limestone slabs in a sidewalk constructed as was this one was dangerous.

It is apparent from this slight recital of the evidence offered that the court did not err in refusing to instruct the jury in defendant's behalf, as is contended.

It is also urged that the damages are excessive. The evidence showed that the deceased was eighteen years of age; that after leaving high school he had been employed for three years by the Great Western Railroad company; that he lived at home with

which consisted of limestone chips extending from the curb
and north to about four feet from the building line on the
south; that south of these chips there was a four-foot extension
light extending from the side to the building line; that while
the intestate with a companion was thus passing over one of the
chips it fell and the deceased was thrown into the basement,
his head and the upper portion of his body being crushed, result-
ing in his death.

The body was released by a company of the City Fire
Department which used jacks and blocks to pry up the portion of
the broken stone chip. This chip was of limestone, about eight
inches thick, ten feet two inches long, and about five feet six
inches in width. It rested at the south end on an I-beam and at
the north end was supported by the retaining wall of the street.
There were no other supports between the beam and the curb.
The evidence also showed that there was a coal hole
in the slab and that this coal hole was about two and a half feet
in diameter; that the I-beam was rusted and corroded, and that the
slab to the west of the one which broke tilted down.

There was also evidence tending to show that this
extension sidewalk was more than twenty years old, and there was
some evidence to the effect that there were cracks in the slab
months prior to the time when it broke. The evidence also tended
to show that the use of these limestone chips in a sidewalk con-
stituted an unsafe and dangerous condition.

It is apparent from this slight recital of the evi-
dence offered that the court did not err in refusing to instruct
the jury in defendant's behalf, as is contended.
It is also urged that the damages are excessive. The
evidence showed that the deceased was eighteen years of age; that
after leaving high school he had been employed for three years by
the Western Electric company; that he lived at home with

his mother; that his habits were good; that he earned \$4.40 a day; that his earnings were turned over to his mother, she in turn providing him with spending money. The damages are high, but not so excessive as to justify a reversal. (Deming, Admr. v. City of Chicago, 237 Ill. App. 637; Deegan, Admr. v. Hydrex Co., 239 Ill. App. 671.) That the money value of life and health has been appreciating while the purchasing power of money has been depreciating in recent years, see Delochery v. Quinlan, 210 Ill. App. 321.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

... and his health was ... in fact
... to his mother, ...
... The damage was high, but not
... (...)
... 327 XII. ... 327 XII.
... (...) That the money value of life and health has been ...
... while the purchasing power of money has been depreciated
... 327 XII. ... 327 XII.
... the income indicated the judgment is affirmed.

REVEREND.

... of ...

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... to ...

... is ...

... is ...

... has ...

... of ...

... of ...

JENNIE SWIBERT,
appellant,

vs.

MORTON A. SWIBERT,
appellee.

APPEAL FROM SUPERIOR COURT
OF COOKE COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On March 10, 1927, the same being one of the days of the March term of the Superior court, the plaintiff upon an ex parte trial before a jury obtained a verdict for the sum of \$5,500 in an action on the case against the defendant for slander and judgment was that day entered on the verdict. The next day, March 11, the defendant made a motion to vacate this judgment. The motion was continued from time to time until April 2, 1927, the same being the last day of the March term of the court, on which day an order was entered denying the motion. This was on Saturday.

On Monday, April 4, the same being the first day of the April term of the court, an order was entered staying the writ of execution. On April 6 plaintiff moved to vacate this order. This motion was continued from time to time until June 13, the same being one of the days of the June term of that court. The order staying the execution was then vacated.

On the following day, June 14, the court vacated the judgment of March 10 without notice, and from that order this appeal was perfected by the plaintiff.

The court having jurisdiction at the time the judgment was entered and the term of court having expired, no motion having been made under section 39 of the Practice act, and the court being a court of law and not of equity, the order setting

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On March 10, 1937, the same being one of the days of the March term of the Superior Court, the plaintiff was in the court room before a jury obtained a verdict for the sum of \$2,500 in an action on the case against the defendant for breach of contract. The next day, and judgment was that day entered on the verdict. The next day, March 11, the defendant made a motion to vacate this judgment. The motion was continued from time to time until April 8, 1937, the same being the last day of the March term of the court, on which day an order was entered denying the motion. This was on Saturday.

On Monday, April 6, the same being the first day of the April term of the court, an order was entered staying the writ of execution. On April 8 plaintiff moved to vacate this order. This motion was continued from time to time until June 13, the same being one of the days of the June term of that court. The order staying the execution was then vacated. On the following day, June 14, the court vacated the judgment of March 10 without notice, and from that order this appeal was perfected by the plaintiff.

The court having jurisdiction at the time the judgment was entered and the term of court having expired, no motion could be made under section 39 of the Practice Act, and the court being a court of law and not of equity, the order setting

aside the judgment of March 10 was entered without jurisdiction.

Defendant cites Hooper v. Seymour, 328 Ill. 134,

but the order there entered was upon petition to a court of equity and the case is therefore clearly distinguishable.

The order appealed from is reversed.

SEYMOUR.

O'Connor and McSurely, JJ., concur.

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THE UNIVERSITY OF CHICAGO

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316 - 32157

RUTH E. WINNETT,
Appellant,

vs.

JOHN E. BARRETT,
Appellee.

65742004
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This was an action on the case for personal injuries, plaintiff in her declaration alleging that while walking toward the north on Austin boulevard, a public street, which runs north and south on the boundary line between Chicago and Oak Park in Cook county, near the intersection of this street with Superior street, another public highway running east and west, and while in the exercise of due care, the defendant so carelessly drove his automobile as to strike and injure her. Negligence was charged in several counts in varied phrase. There was a plea of not guilty, a trial by jury, and a verdict for defendant; a motion for a new trial was over-ruled and judgment entered upon the verdict. The errors assigned and argued are that the verdict is against the weight of the evidence and that there was error in giving and refusing certain instructions. There have been three trials of this cause. In the first trial there was a verdict of guilty, plaintiff's damages assessed at \$2500 and a new trial granted upon plaintiff's motion. At the second trial the jury disagreed.

The evidence offered for plaintiff tended to show that between six and seven o'clock p. m. January 10, 1925, plaintiff was walking on the west side of Austin boulevard towards the north; that as she proceeded north at the intersection of Austin boulevard and Superior street she stepped from the curb, having first looked to the north, west and east to see if any traffic was coming, and that

JOHN E. BARNETT

JOHN E. BARNETT

MR. BARNETT'S EXHIBIT

DELIVERED THE EVIDENCE OF THE COURT

Exhibit

This was an action on the case for personal injuries

alleged to have been sustained by the plaintiff while walking toward

the north on Austin boulevard, a public street, which runs north

and south on the boundary line between Chicago and Oak Park in

Cook County, near the intersection of this street with Superior

street, another public highway running east and west, and while

in the exercise of due care, the defendant so negligently drove

his automobile as to strike and injure her. Negligence was charged

in several counts in varied phrases. There was a plea of not guilty.

A trial by jury, and a verdict for defendant; a motion for a new

trial was overruled and judgment entered upon the verdict. The

verdict assigned and argued are that the verdict is against the

weight of the evidence and that there was error in giving and re-

framing certain instructions. There have been three trials of this

cause. In the first trial there was a verdict of guilty, plain-

ly's damages assessed at \$2500 and a new trial granted upon plain-

ly's motion. At the second trial the jury disagreed.

The verdict after the third trial is now set

aside and the case is set for a fourth trial.

As the plaintiff's motion for a new trial was granted, the

plaintiff's motion for a new trial was granted, the

plaintiff's motion for a new trial was granted, the

plaintiff's motion for a new trial was granted, the

plaintiff's motion for a new trial was granted, the

plaintiff's motion for a new trial was granted, the

just as she stepped off the curb she was struck by an automobile driven by the defendant who was driving his machine north on Austin boulevard and made a left turn into Superior street. Several other witnesses testified that the defendant at the time of the accident admitted that he was at fault, and the testimony of the plaintiff as to the manner in which the accident occurred is corroborated by a disinterested witness.

The defendant testified, however, that at the time in question he drove north on Austin boulevard on the east side of the street. He says that when he came to Superior street there was a machine coming from the north and he slowed down and let it go by; that he started to drive west down the north side of Superior street when he saw a woman coming from the south very fast; that he threw on his brakes but did not avoid hitting her. A nephew of the defendant riding with him at the time of the accident, testified at the trial (he was ten years of age when the accident occurred), giving rather unsatisfactory evidence tending to corroborate the testimony of the defendant.

Plaintiff urges that the verdict was manifestly against the weight of the evidence, and that contention raises a rather close question. However, as the case must be tried again, we shall not discuss the weight of the evidence.

On a record such as here appears, it is important that the instructions as to the law applicable should be accurate. Complaint is made of defendant's given instruction number 10, which is as follows:

"The court instructs the jury that the fact that the court has instructed you respecting the matter of measure of damages which may be allowed to the plaintiff, in case you find that she is entitled to recovery under the evidence and these instructions, and the fact that defendant's counsel may have discussed this subject in argument before you, is not to be taken or regarded by the jury as implying in any way that either the court or said counsel are of the opinion or are admitting that the plaintiff is entitled to an allowance of damages in any amount whatsoever."

just as the accused left the camp and was struck by an automobile
driven by the father of the girl who was killed. The father
witnessed the accident and made a full statement to the police.
Several other witnesses testified that the defendant at the time of the acci-
dent admitted that he was at fault and the testimony of the plain-
tiff as to the manner in which the accident occurred is corroborated
by a disinterested witness.

The defendant testified, however, that at the time in
question he drove north on Austin Boulevard on the east side of the
street. He says that when he came to Webster Street there was a
machine coming from the north and he slowed down and let it go by;
that he started to drive west down the north side of Webster Street
when he saw a woman coming from the north very fast; that he tried
to stop but did not avoid hitting her. A neighbor of the de-
fendant living with him at the time of the accident, testified at
the trial (he was ten years of age when the accident occurred),
that he saw the defendant's car coming from the north and striking the
woman.

The defendant also testified that the verdict was manifestly against
the weight of the evidence, and that conviction raises a further ques-
tion. However, in the case must be tried again, we shall not
reverse the weight of the evidence.

On a review such as here appears, it is important that
the instructions to the jury should be correct. The
court is not at liberty to give instructions number 10, which in-
structs the jury to find the defendant guilty.

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number 10, which instructs the jury to find the defendant guilty.

In connection with her criticism of this instruction plaintiff calls attention to the fact that the court refused to give plaintiff's requested instruction number 2, by which the jury would have been told:

"The jury are instructed that they, under the instructions of the court and from the evidence in the case, are the sole judges of the facts in the case, and the court does not intend by these instructions, or in any other manner, to indicate to them his opinion on the facts or the merits of the case."

We think plaintiff was entitled to instruction number 2, and that defendant's instruction number 15 was improper, in that the jury might be led to infer from the language that the court and counsel for defendant were of the same opinion. The defendant says that an instruction similar to plaintiff's refused instruction number 2 was condemned in Chicago Gen. Ev. Co. v. Kovacek, 94 Ill. App. 131; but the instruction there given did not limit the jury to the evidence given in the particular case. We think that instruction number 2 should have been given, and that without an instruction to the jury on the point covered by that instruction, defendant's instruction number 15 is subject to criticism as tending to confuse and mislead the jury.

Defendant also complains of instruction number 15, which is as follows:

"The court instructs the jury that on the occasion in question, the defendant operating and in charge of the said automobile was not required to anticipate or guard against any actions or conduct on the part of the plaintiff not reasonably to be expected under the circumstances, and the law did not require the defendant operating the said automobile to regulate his conduct with reference to the actions or conduct of the plaintiff which could not reasonably be expected under the circumstances, and if the jury believe from the evidence that the plaintiff suddenly, unexpectedly and without warning to the defendant operating said automobile, walked or ran directly in front of the said automobile, and there was nothing which could or would place the defendant operating said automobile upon notice of such sudden and unexpected action or conduct on the part of the plaintiff, if such action was sudden and unexpected, and if you further believe that the plaintiff thereby received the injuries complained of and the defendant operating said automobile was unable to prevent the accident after discovering said sudden and unexpected act on the part of the plaintiff, if any, then the plaintiff cannot recover and you should find the defendant not guilty."

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and it was believed that the evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt. The jury returned a verdict of guilty, and the defendant was sentenced to life imprisonment.

We do not hesitate to say that irrespective of other instructions, the giving of this instruction under the facts appearing in this case is reversible error. As plaintiff points out, there is an assumption that plaintiff's actions were unexpected although that was a controverted point under the evidence. The instruction is argumentative and assumes that it was necessary for the plaintiff to give warning or notice to the defendant; and it directs a verdict but does not impose upon the defendant the necessary element of ordinary care in the driving of his machine. Lovitsky v. Snickerbocker Ice Co., 276 Ill. 102. It is of course elementary that an instruction which directs a verdict must include all the elements which the jury must necessarily find in order to return such verdict.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

We do not hesitate to say that irrespective of other
 considerations, the giving of this instruction under the facts ap-
 pearing in this case is reversible error. As plaintiff's counsel
 stated, there is no testimony that defendant's conduct was
 negligent. It is true that the defendant's conduct was
 negligent in the sense that it was a departure from the
 standard of care which a reasonable person would exercise
 under the circumstances. But the plaintiff is not entitled to
 recover unless it is shown that the defendant's conduct was
 negligent in the sense that it was a departure from the
 standard of care which a reasonable person would exercise
 under the circumstances. It is of course
 essential that the plaintiff prove that the defendant's
 conduct was negligent in the sense that it was a departure
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 essential that the plaintiff prove that the defendant's
 conduct was negligent in the sense that it was a departure
 from the standard of care which a reasonable person would
 exercise under the circumstances.

... ..

ELLA S. FRIEDMAN,
Appellee,

vs.

G. FRANK HOGAN,
Appellant.

65722041
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order denying a motion of the defendant to set aside a judgment theretofore entered by confession under the terms of a written lease. The judgment was for \$200 and attorney's fees, the rent being for the last month for which the term was devised. The motion of defendant was supported by an affidavit which was not and, under proper practice, could not be contradicted.

The defendant by this affidavit averred that he had a good defense to the suit on the merits to the whole of the plaintiff's demand; that this defense was that he had paid all the rent reserved in the lease upon which plaintiff based her claim except the rent for April, 1927; that after he paid the rent for March, 1927, and prior to March 17, 1927, the plaintiff lessor took possession of the premises described in the lease, to-wit, apartment No. 2 on the second floor of the building at 5315 Kenmore avenue, Chicago, and changed the lock on the door of the apartment or caused it to be changed, so that affiant's key would not open the door and affiant was unable to enter said apartment; further, that during March, 1927, plaintiff lessor being in possession of the apartment, without notice to affiant and entirely without his consent or permission, by her agents dismantled and removed all the electric light fixtures in the apartment, removed the ice-box and kitchen sink from the apartment, knocked out an entire partition between two of

RECEIVED FROM BUREAU OF THE COURT

OF CHICAGO.

WILLIAM S. WHELAN, JR.,
1100

W. FRANK KOWAL,
Appeal and

RE: PETITIONING JUDICIAL MARRIAGE

FOR THE DELIVERANCE OF THE COURT.

This report is from an order denying a motion of the
defendant to set aside a judgment theretofore entered by conviction
and term of a prison term. The judgment was for \$200 and
attorney's fees, the term being for the last month for which the
term was denied. The motion of defendant was supported by an
affidavit which was not and under proper practice, could not be
contradicted.

The defendant by this affidavit averred that he had
a good motive to the suit on the whole of the
plaintiff's demand; that this defense was that he had paid all the
rent reserved in the lease upon which plaintiff based her claim
except the rent for April, 1937; that after he paid the rent for
March, 1937, and prior to March 17, 1937, the plaintiff's lease book
possession of the premises described in the lease, to-wit, apartment
No. 3 on the second floor of the building at 818 1/2 Kansas Avenue,
Chicago, and changed the lock on the door of the apartment or caused
it to be changed, so that plaintiff's key would not open the door and
plaintiff was unable to enter said apartment; further, that during
March, 1937, plaintiff's lease being in possession of the apartment,
without notice to plaintiff and entirely without his consent or per-
mission, by her agents dismantled and removed all the electric lights
fixtures in the apartment, removed the ice-box and kitchen sink
from the apartment, installed an ironing partition between two of

the rooms in the apartment, plastered the walls and ceilings of some of the rooms, and otherwise rendered the apartment untenable and impossible of possession or occupation by affiant.

It is of course elementary that a lesser who takes possession and excludes the lessee cannot recover rent for the time during which the lessee is so excluded. The plaintiff, however, contends (correctly) citing cases (Gilmore v. German Savings Bank, 89 Ill. App. 442) that an affidavit is to be construed most strongly against the party making an application to have the judgment set aside. Invoking this rule, the plaintiff urges that the affidavit does not state that the defendant was in possession of the premises at the time the plaintiff committed the acts complained of, and she says that the court may not infer this and the facts averred in the affidavit must therefore be considered as though the defendant were not in possession of the premises at the time of the occurrences mentioned in the affidavit; that in fact the only logical conclusion that can be drawn is that the defendant was not in possession of the premises at that time but had abandoned the same.

Plaintiff points out that the affidavit does not aver that the defendant had any furniture or other household effects in the apartment, and that this also supports the conclusion that defendant had vacated and abandoned the premises some time prior to the month of March, 1927. She says that if the defendant was not in possession of the premises during the month of March but had abandoned and vacated them prior thereto, then under the terms of the lease which is in evidence, the plaintiff had the right to enter the premises and take possession of them without notice and without process of law. She points out that the affidavit does not aver that defendant was forced to surrender the premises by reason of the acts of the plaintiff, or that the defendant did in fact surrender the premises because of these acts; and she argues

that a lessee who relies on a constructive eviction to avoid the payment of rent must plead and prove that he surrendered the premises because of the acts of the lessor which constituted such constructive eviction. Hill v. Terra Santa Brewing Co., 203 Ill. App. 171, and Furner v. Wisniewski, 203 Ill. App. 347, are cited to the point that a plea to an action for rent which relies upon a constructive eviction is bad if it fails to show a surrender of the premises. The facts here recited tend to show an actual rather than constructive eviction.

It is not denied that an affidavit of this sort is to be construed most strongly against the defendant, and all ambiguous statements therein resolved in defendant's favor; but a majority of this court are of the opinion that this rule does not require a defendant to negative in an affidavit of this kind every conceivable fact or state of facts under which the defendant might be liable. This court therefore holds that it was not necessary that the affidavit of defendant should negative defendant's abandonment of the premises prior to the acts tending to constitute an eviction; that the affidavit set up a good defense, and that in the exercise of a sound discretion the court should have opened the judgment and permitted a trial on the merits.

For the reasons indicated the order appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

that a person who relies on a constructive eviction to avoid the payment of rent is not bound and prove that he surrendered the lease because of the acts of the lessor which constituted such constructive eviction. Hill v. Texas Land & Lumber Co., 202 Ill. App. 171, and Murray v. Wisconsin Central, 202 Ill. App. 347, are cited to the point that a plea to an action for rent which relies upon a constructive eviction is bad if it fails to show the number of the premises. The facts here recited tend to show a factual rather than a constructive eviction.

It is not denied that an affidavit of this sort is to be returned most strongly against the defendant, and all judgments rendered thereon are in defendant's favor; but a majority of this court are of the opinion that this rule does not require the return of a negative in an affidavit of this kind every conceivable case or state of facts under which the defendant might be liable. This court therefore holds that it was not necessary that the affidavit of defendant should negative defendant's abandonment of the premises prior to the date falling to construct an extension; that an affidavit of a kind which does not do this is inadmissible. In this case the court should have opened the judgment and permitted a trial on the merits.

J. WILLIS HORTON, Administrator
of Estate of WILLIS L. HORTON,
Deceased,

Appellee,

vs.

LEON E. ZITNER,

Appellant.

65-930-1
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE BACHMATT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued as administrator for damages for the death of his intestate and filed a declaration in several counts charging negligence of varied kinds, and alleging in one count that defendant's negligence was wilful and wanton. The defendant pleaded the general issue, and there were motions by defendant at the close of plaintiff's evidence and again at the close of all the evidence for an instructed verdict, which were denied. The jury returned a verdict of guilty, assessing damages at \$8,000, for which amount, after over-ruling motions for a new trial and in arrest, the court entered judgment.

The defendant contends that the motions for an instructed verdict should have been granted, and this is the principal error assigned and argued. The grounds urged are that there is no evidence tending to show that the intestate was injured as a result of the accident; or, it is said, if this be conceded then there is no evidence tending to show that the intestate died as a result of the injuries received; or, it is argued, if all these facts be conceded there is no evidence tending to show that the deceased was in the exercise of due care.

It is not contended that there is any evidence negating these facts, but only that all the evidence offered and received fails to establish any one of them. In determining that

THE STATE OF TEXAS,
COUNTY OF DALLAS.

IN SENATE,
JANUARY 11, 1911.

REPORT

OF THE
COMMISSIONERS OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE,
JANUARY 11, 1911.

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question the rule to be applied is well established. If there is any evidence from which, together with all reasonable inferences to be drawn therefrom a jury could reasonably find such fact or facts were proved, then the contention cannot be sustained. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Davine v. Delano, 272 Ill. 166; Kelly v. Chicago City Ry. Co., 283 Ill. 640.

In consideration of these points it is also important to notice that defendant filed no special plea but relied upon a general plea of not guilty. Under the practice of this state, this plea denies only the wrongful act alleged and does not put in issue the ownership, possession or operation of the instrumentality or property which caused the injury. Whatever the rule may be in other states, this rule is established in this state by a long line of decisions which are cited and adhered to by our Supreme court in the recent case of Mueller v. Hayes, 321 Ill. 275.

The declaration averred that the deceased met his death January 1, 1926, at or near the intersection of Broadway and Berwyn avenue, two public highways in Chicago, as a result of having been struck by a motor vehicle operated and controlled by the defendant.

The evidence offered in behalf of plaintiff tended to show that the deceased lived at the home of his father at No. 1511 Touhy avenue; that December 31, 1925, he with others played bridge at home until about eleven o'clock in the evening, when he went with companions to the Edgewater Beach hotel; that he left there to go home at about 2:30 in the morning of January 1, 1926, at which time he appeared "perfectly natural." While he was at the Edgewater Beach hotel there was a large crowd there dancing and drinking, and the group with the deceased circulated around the crowd at various tables and danced, but the evidence tends to show deceased did not drink.

Defendant says that about three o'clock of that morn-

...is well established. It is in
any evidence from which, together with all reasonable inferences
to be drawn therefrom a jury could reasonably find such facts
facts were proved. In the contention cannot be sustained. Ill. Ex.
1931, 211. 200; Taylor v. Taylor, 211. 200.

In consideration of these points it is also important
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general plea of not guilty. Under the practice of this state,
this plea denies only the wrongful act alleged and does not deny
the ownership, possession or operation of the instrumentality
or property which caused the injury. Whatever the rule may be in
this state, this rule is established in this state by a long line
of decisions which are cited and referred to by our highest court
in the recent case of Ill. Ex. 1931, 211. 200.

The defendant averred that the deceased met his death
January 1, 1930, at or near the intersection of Broadway and Twenty
avenue, two public highways in Chicago, as a result of having been
struck by a motor vehicle operated and controlled by the defendant.
The evidence showed in detail of plaintiff's death
show that the deceased lived at the home of his father at No. 1231
Twenty avenue; that December 31, 1929, he with others stayed at the
at home until about eleven o'clock in the evening, when he was
with companions to the Edgewater Beach Hotel; that he left there to
go home at about 8:30 in the morning of January 1, 1930, at which
time he was "fatally injured." While he was at the Edgewater
Beach Hotel there was a large crowd there dancing and drinking, and
the group with the deceased circulated around the crowd at various
tables and tapers, but the witness tends to show deceased did not
defendant says that about three o'clock of that morn-

ing he was driving a Buick sedan and turned west to Broadway; that the morning was foggy; that as he left Foster avenue and started north on Broadway he went about twenty miles an hour; that he did not see a Checker taxicab there; that he kept his car at the Catalpa, a public garage on the west side of Broadway; that he did not see anybody at Berwyn avenue; that he, however, did not turn into his garage when he came to it; that he could not get in there because there was heavy traffic going north; that there was a Yellow cab station across from his garage; that when he got a block beyond the garage he was stopped by a Checker taxicab driver who blew a horn; that the driver told him that he had knocked somebody down, and defendant said, "All right, if you think so, I will go back;" that he went back to the place but didn't see anybody there; that he put his car up for the night and went to his home at 5653 Winthrop avenue, and that he had heard nothing more about the accident until the next Saturday. He says that the only reason that he passed the garage was because of the Yellow cabs and the heavy traffic; that it took probably ten or twelve minutes to go three blocks on Broadway; that he was going about five miles an hour, very, very slow; that when he turned around and went back he came to Berwyn avenue; that when he crossed Berwyn avenue there was a car in front of him, and as he went north from Foster avenue to Broadway he followed a car, and that he could not get ahead of it. He further said that he did not remember what he testified to before the coroner two years before.

Harry Stein, who testified that he was a driver for the Checker Taxicab Company, said that on the morning of January 1st he was going north to Rogers Park with a passenger and was driving a Cadillac Checker cab on Broadway, which is fifty feet or more wide and at Berwyn avenue about thirty or thirty-five feet; that he first saw the young man in the accident on the north track in front of the car; that there was a Buick ahead of him; that he

was just about five feet behind on the right side of him; that the Buick was traveling in the north street car tracks; that when he first saw the young man he was about five feet from the Buick sedan; that the young man jumped and tried to dodge the car; that the young man was knocked down; that the witness thought he might save him but he did not get a chance; that the Buick sedan was travelling about twenty-five miles an hour; that the witness chased after the Buick, caught up with him and said, "You knocked a man down, why didn't you stop?"; that the man opened up the window and the witness repeated what he said, when the man turned around to go back to the place where the man was knocked down. The witness identified the man in the Buick sedan as Leon S. Zitomer.

This witness further said that when he went back to the place "he was still laying down in the middle of the street. There were quite a few people there. I parked my car and went looking for the Buick sedan. I did not see the man in the Buick after that." He said that the "man" was taken to the hospital. This witness further said that he testified before the coroner.

Della Burke testified that she is a trained nurse, twenty-five years old; that she was waiting for a street car at the time of the accident; that she saw the young man step out to see if a car was coming; that she looked in another direction and the first thing she knew the boy had been hit and thrown about twenty-five feet; that it was a sedan automobile and kept on going; that the automobile was moving about thirty miles an hour; "I saw a street car coming from the south about a block away. I ran over to where the boy was lying and tried to lift him up. I felt his pulse and it beat a little faintly. I stayed there about ten minutes. *** And when he lay there he lay just like he was dead; he looked to me like he was dead. There were a

was just about five feet behind on the right side of him; that the
Hick was traveling in the north street car track; that when he
saw the young man jump and tried to dodge the car; that the
young man was knocked down; that the witness thought he might
have him but he did not get a chance; that the Hick again was
traveling about twenty-five miles an hour; that the witness
crossed after the Hick, caught up with him and said, "You knocked
a man down, why didn't you stop?" That the man opened up the
window and the witness requested what he said, when the man turned
around to go back to the place where the man was knocked down.
The witness identified the man in the Hick cab as Jack H.

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twenty-five feet; that it was a sedan automobile and went on
about thirty miles an hour.
I saw a street car coming from the south about a block
away. I ran over to where the boy was lying and tried to lift
him up. I did not know what to do. I called a little later. I stopped
when I saw the car. And when the boy there he lay just
that is what I saw; he looked as if he was dead. There were

lot of machines going past there at the time, coming from the other direction. I tried to lift him up to see, and he was a dead weight so I figured he was dead. The man made me get away from the body.

Q. Did you do anything else there other than that? A. I felt his pulse and it beat just a little, faintly, that was all. At that time I had been working as a nurse for two years. I am a graduate registered nurse."

Mrs. Agnes Furrey, a stenographer, testified that at the time in question she was a companion of Della Burke and saw the accident; that the boy jumped to the west side of the street; that the front part of the car threw him up a few feet and then he was thrown to the other side of the street; that he landed about thirty feet away and lay perfectly still; that she then saw several cars coming from the north and two of these ran over him as he lay in the street; "he was lying perfectly still. I do not know whether he was alive or not. **** The automobile that struck the boy was going about thirty-five to forty miles an hour. I did not hear any signal or horn."

His father testified that Willis Horton, who died January 1, 1926, was twenty-two years old, and Frank Henderson testified that he lived with the Hortons; that he knew W. L. Horton, the deceased, in his lifetime; that prior to his death he worked for his father; that he had formerly worked for the Tribune; that he had gone through high school and had taken a post graduate course in the high school; that he went to business college and then to the University of Illinois for a year; that he looked to be very healthy; that he earned forty dollars a week; that on the evening of New Year's 1925 he was at the Horton home; that there were three young men there, his niece and himself; that they were visiting and playing cards; that they left about eleven o'clock; that the deceased paid his mother and father eight dollars a week out of his salary; that the witness learned of the accident at three o'clock in the

for at Madison going west there is the line, coming from the other
direction. I go on to lift him up to see, and he was a dead weight
so I figured he was dead. The man made me get away from the body.
Q. Did you do anything else there other than that? A. I tell
his name and it was just a little, lately, that was all. As
that time I had been working as a nurse for two years. I am a

graduate registered nurse.
Q. Mrs. Anne Murray, a stenographer, testified that at
the time in question she was a companion of Della Burke and was
standing; that the boy jumped to the west side of the street; that
the front seat of the car threw him up a few feet and then he was
thrown to the other side of the street; that he landed about thirty
feet away and lay motionless still; that she then saw several cars
coming from the north and two of these ran over him as he lay in
the street; "he was lying motionless still. I do not know whether
he was alive or not. The ambulance that arrived the boy was
going about thirty-five to forty miles an hour. I did not hear any
signal or horn."

His father testified that Willis Horton, who died
January 1, 1932, was twenty-two years old, and Frank Henderson tes-
tified that he lived with the Hortons; that he knew W. L. Horton,
the deceased, in his lifetime; that prior to his death he worked for
Horton; that he had formerly worked for the Tribune; that he had
gone through high school and had taken a good graduate course in the
high school; that he went to business college and then to the Uni-
versity of Illinois for a year; that he looked to be very healthy;
that he earned forty dollars a week; that on the evening of Mon-
day's 1932 he was at the Horton home; that there were three young
men there, his niece and himself; that they were visiting and dis-
cussing; that they left about eleven o'clock; that he was
with the woman and woman about fifteen minutes at the time;
that the witness looked at the condition of these streets on the

morning; that he went to the Lake View Hospital and saw the young man, Willis Horton, there and that he was dead.

Applying the rule of law which has heretofore been stated, we think that in view of the pleadings the testimony of the Checker taxicab driver connecting the defendant with the accident in which the boy was injured, the taking of the body to the hospital, the defendant's admission that he testified at the inquest, the admitted time at which the accident occurred, and the fact that the witness Henderson, who was a brother-in-law of the father, went to the Lake View hospital at three o'clock in the morning and found Willis Horton dead, a jury could reasonably infer from the evidence, together with facts which must be considered as admitted by the pleadings, that the young man injured by defendant's car on that morning was plaintiff's intestate; and that fact being conceded we think there is little merit to defendant's other contentions. The nature of the accident, the circumstances as testified to by many witnesses, in particular the testimony of the nurse as to her examination of the deceased immediately after the accident, and the positive proof that he was in good health prior thereto and died almost immediately thereafter, are facts from which his death as a result of the injuries sustained might be properly inferred.

It is asserted, however, that conceding the foregoing, plaintiff is nevertheless not entitled to recover because the uncontradicted facts show that the deceased was not at and just prior to the injuries in the exercise of ordinary care for his safety. It is said that he was therefore guilty of contributory negligence. It is ordinarily true that in order to recover in a case of this character the plaintiff must allege and prove that the deceased was in the exercise of due care and caution at and just prior to the time he received his injuries. Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505. One count of the declaration, however, charged the defendant with wilful and wanton conduct in driving his automobile

testimony that he went to the Lake View Hospital and saw the young
 man, Willie Horton, there and that he was dead.
 Applying the rule of law which has heretofore been
 stated, we think that in view of the pleadings the testimony of the
 deceased taxicab driver connecting the defendant with the accident
 in which the boy was injured, the falling of the body to the hospital,
 the defendant's admission that he testified at the inquest, the
 admitted time at which the accident occurred, and the fact that
 the witness Henderson, who was a brother-in-law of the father, went
 to the Lake View Hospital at three o'clock in the morning and found
 Willie Horton dead, a jury could reasonably infer from the evi-
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 the pleadings, that the young man injured by defendant's car on that
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 positive proof that he was in good health prior thereto and died
 almost immediately thereafter, are facts from which his death as a
 result of the injury sustained might be properly inferred.
 It is asserted, however, that conceding the foregoing,
 plaintiff is nevertheless not entitled to recover because the un-
 controverted facts show that the deceased was not at that time
 so the injury in the exercise of ordinary care for his safety.
 It is said that he was therefore guilty of contributory negligence.
 It is substantially true that in order to recover in a case of this
 nature the plaintiff must allege and prove that the deceased was
 in the exercise of due care and caution at and just prior to the
 time he received his injury. Bowell v. C. & A. Ry. Co.
 201 Ill. 707. One count of the declaration, however, charged the
 defendant with willful and wanton conduct in driving his automobile

against plaintiff's intestate, and we think we cannot say there was no evidence tending to sustain that charge. In such a condition of the record, it is unnecessary to prove that the deceased was in the exercise of due care. Brown v. Ill. Terminal Co., 319 Ill. 326; Walldren Express Co. v. Krug, 291 Ill. 472. Moreover, under all the facts as same appear in the evidence, we think the question of due care was one for the jury.

The defendant also complains of the instructions given to the jury and especially of No. 1, which told the jury "that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by a preponderance of the evidence. If the jury find that the evidence bearing upon the issues in this case preponderates in his favor although but slightly, it would be sufficient to justify a finding of the issues in his favor." In the recent case of Jansha v. Public Service Co., No. 31713, not yet reported, after reviewing the cases, we declined to hold that the giving of this instruction constituted reversible error.

Defendant also complains of plaintiff's instruction number 5 as calculated to mislead the jury because by it the jury was referred to the plaintiff's "declaration," whereas the declaration had been amended, and defendant therefore claims that the instruction should have referred to the "amended declaration." We must assume that the jury which passed upon this case was intelligent, and that being assumed we cannot think this instruction was misleading.

Defendant also complains that certain instructions as to the law of contributory negligence as requested by the defendant erroneously were refused. We do not think so on this record.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

...and we think we cannot say there was no evidence tending to sustain that charge. In such a condition of the record, it is unnecessary to prove that the deceased was in the possession of the car. ... Moreover, under all the facts as they appear in the evidence, we think the question of the case was one for the jury.

The defendant also complains of the instructions given to the jury and especially of No. 1, which told the jury "that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by a preponderance of the evidence. If the jury find that the evidence bearing upon the issues in this case preponderates in his favor although not slightly, it would be sufficient to justify a finding of the issues in his favor." In the ... after reviewing the same, we declined to hold that the ... of this instruction constituted reversible error.

Defendant also complains of plaintiff's contention ... as requested to advise the jury because by it the jury was referred to the plaintiff's "declaration," whereas the declaration had been amended, and defendant therefore claims that the instructions should have referred to the "amended declaration." ... that the jury which passed upon this case was intelligent, and that being assumed we cannot think this instruction was misleading.

Defendant also complains that certain instructions ... to the law of contributory negligence as recommended by the defendant ... We do not think so on this record. The judgment is therefore affirmed.

6574

THE FORDMAN TRUST & SAVINGS BANK,
Administrator of the Estate of
GEORGE BOBRUK, Deceased,
Appellant,

vs.

ROYAL MOTOR DELIVERY COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued as administrator for damages by reason of the death of its intestate as a result of injuries sustained, as averred, through the negligence of the defendant. There was a trial by jury and a verdict for the defendant upon which the court entered judgment.

The errors assigned and argued are that the verdict was contrary to the law and the evidence, and there were errors in giving instructions for defendant and in refusing instructions offered by the plaintiff.

Plaintiff's intestate was a boy six years of age. He died as a result of injuries which he sustained in a collision between a truck driven by an agent of the defendant and a five-passenger touring car in which the deceased was riding. The accident occurred at the intersection of 14th place and Laflin street in Chicago on September 2, 1924. Fourteenth place is a public street extending east and west, and Laflin street is a public highway extending north and south.

The Ford touring car was driven by Samuel Kusta, and Gustave Arger sat with the driver in the front seat. The deceased, his brother Fred and John Arger sat in the back seat. Samuel Kusta was 21 years of age; Gustave Arger sixteen and Fred Bobruk seventeen years of age. Kusta was the owner of the Ford car and had

THE HONORABLE JUSTICE
ADMINISTRATOR OF THE DISTRICT OF
COLUMBIA, D.C.

IN THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA
IN AND FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF
JAMES H. HARRIS, DECEASED
ADMINISTRATOR OF THE ESTATE OF
JAMES H. HARRIS, DECEASED

The plaintiff seeks an administrator for the estate of the decedent, and the defendant seeks an administrator for the estate of the decedent. The plaintiff seeks an administrator for the estate of the decedent, and the defendant seeks an administrator for the estate of the decedent. The plaintiff seeks an administrator for the estate of the decedent, and the defendant seeks an administrator for the estate of the decedent.

The estate of the decedent is insolvent, and the plaintiff seeks an administrator for the estate of the decedent. The estate of the decedent is insolvent, and the plaintiff seeks an administrator for the estate of the decedent. The estate of the decedent is insolvent, and the plaintiff seeks an administrator for the estate of the decedent.

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owned it for four or five months. He had been driving a car for a year and a half. He knew his brakes were weak before he started the trip. The car was an open one and had no speedometer, but those who rode in it testified for plaintiff that it was going about 15 miles an hour. Both streets were about 45 feet wide. The Ford car was going west on the north side of 14th place, the truck coming north on the east side of Laflin street.

The witnesses for the plaintiff testified that the truck struck the rear ^{left} wheel of the Ford, broke the two rear wheels, the windshield, the steering wheel and cracked the crank case of the Ford. They testified that the Ford was thrown north and west to the curb and its passengers thrown out. The witnesses for plaintiff said that when they approached the intersection they saw the truck coming almost 70 or 75 feet away from the southeast curbline.

The truck driver testified that he was 23 years of age and had been a chauffeur in Chicago for 3 years; that at the time in question he was driving a Delaco LeMoon open body, stake truck; that the brakes were in A-1 condition and the mechanism was in perfect condition; that the only load on the truck was 25 pieces of veneer panels; that it was a nice day and the streets were dry; that he had a speedometer on the truck which registered about 11 miles an hour; that when he got about 10 feet from the corner of 14th place he blew his whistle; that the machine in which deceased was riding came along at the rate of 40 or 45 miles an hour with five young fellows in it and the top down; that he was just about 5 or 6 feet from the corner when he noticed the car coming; that he stopped there and these boys drove right on; that instead of continuing west the way they were going, they tried to make a turn toward the way he was going; that their rear fender hooked his right fender and threw a child out; that he picked up the child and looked for a drugstore or for a policeman to take him to the hospital

about 10 to 15 or 20 feet. He had been driving a car for a year and a half. He knew his brakes were weak before he started the trip. The car was an open one and had no speedometer, but these two facts in it testified for plaintiff that it was going about 15 miles an hour. Both streets were about 45 feet wide. The Ford car was going west on the north side of 14th street, the truck coming north on the east side of 14th street.

The witnesses for the plaintiff testified that the truck struck the rear wheel of the Ford, broke the two rear wheels, the windshield, the steering wheel and cracked the crank case of the Ford. They testified that the Ford was thrown north and west to the curb and the passengers thrown out. The witnesses for plaintiff said that when they approached the intersection they saw the truck coming almost 50 or 75 feet away from the southeast curbline.

The truck driver testified that he was 35 years of age and had been a chauffeur in Chicago for 8 years; that at the time in question he was driving a Nelson Johnson open body, coupe, four; that the brakes were in A-1 condition and the mechanism was in perfect condition; that the only load on the truck was 25 pieces of vacuum pans; that it was a nice day and the streets were dry; that he had a speedometer on the truck which registered about 15 miles an hour; that when he got about 15 feet from the corner of 14th street he saw the Ford; that the engine in which he was riding came along on the west side of 14th street about five young fellows in it and the top down; that he was just about 5 or 6 feet from the corner when he noticed the car coming; that he stopped there and these boys drove right on; that instead of continuing west the way they were going, they tried to make a turn toward the way he was going; that their rear fender hooked his rear fender and threw a child out; that he picked up the child and

that a man came along in a Buick and he asked him if he would take the child to a hospital, which the man said he would do; that the witness then went back to the corner and notified the police and then tried to get his witnesses.

The truck driver said he would judge that the other car was going about 25 or 30 miles an hour as it came across the intersection; that it did not seem to slow down; that he stopped right there; that the rear of his truck after the accident was about 6 to 8 feet beyond the south curb of Laflin street and about 6 feet north of the curb on 14th place; that the truck was about 15 feet long; that the front end of his truck must have been about 15 feet north of the south line of 14th place; that the Ford car landed on the northwest corner with one wheel on the sidewalk; that no one fell out when the Ford hit his truck; that just the right front fender was damaged but not badly, and the chassis of his truck was injured; that the Ford didn't sound any warning before it hit him; that he reached the intersection first; that he started to cross the intersection about 25 feet back.

He says that he saw the car approach from the right as he got to the corner; that he couldn't see it before he got there because of a fence; that there was a barn or fence of some kind and he couldn't see over that fence; that there was nothing to block the view except the fence, which was so high that he couldn't see over it. He denied that the rear end of the Ford was hit by the left side of his truck. He says that when he saw the Ford coming west he just swung his wheels west for not more than a foot; that he was not at the north curb line at that time but pulled the truck over after the accident.

He says that when he got to the corner he had a full view of 14th place; that there was nothing on the sidewalk to block his view; that he saw the Ford about 25 or 30 feet down from the intersection; that when he came there he slowed up and was traveling

that a man came along in a truck and he asked him if he would take the child to a hospital, which the man said he would do; that the witness then went back to the carter and notified the police and then tried to get his witness.

The truck driver said he would judge that the other car was going about 40 or 50 miles an hour as it came across the intersection; that it did not seem to slow down; that he stopped right there; that the rear of his truck after the accident was about 6 to 8 feet beyond the south curb of Larkin street and about 6 feet north of the curb on 14th place; that the truck was about 15 feet long; that the front end of his truck was about 15 feet north of the south line at 14th place; that the left car landed on the northwest corner with one wheel on the sidewalk; that he saw the front of the truck hit the truck; that just as the front of the truck was damaged but not badly, and the chassis of his truck was injured; that the word didn't sound any warning before it hit him; that he reached the intersection first; that he started to cross the intersection about 35 feet back.

He says that he saw the car approach from the right on 14th street; that he couldn't see it before he got there because of a fence; that there was a bar or fence of some kind and he couldn't see over that fence; that there was nothing to block the view across the fence, which was so high that he couldn't see over it. He pointed that the rear end of the Ford was hit by the left side of his truck. He says that when he saw the Ford coming west he just swung his wheels west for not more than a foot; that he was not at the north curb line at that time but pulled the truck over after the accident.

He says that when he got to the corner he had a full view of 14th place; that there was nothing on the sidewalk to block his view; that he saw the Ford about 25 or 30 feet down from the intersection; that when he came there he slowed up and was preventing

about 8 miles an hour; that he figured that he went about 3 feet when he saw the Ford coming until he stopped; that he was to the south curb then; that he saw the car coming 30 feet away; that he was at the sidewalk line, 9 feet back from the curb; that he put on his brakes and went about 3 feet before he stopped; that the truck didn't stop south of the sidewalk line on the south side of the street; that the truck stopped north of the sidewalk line.

He says that the right front fender of his truck came in contact with the Ford, the outside of the nose part of the chassis, and there is just a sharp crack there; that the truck would not have hit the Ford at all if the Ford had continued the way it was going, but the driver tried to make a turn the same way the driver of the truck was going, and that his rear fender hooked the front fender of the truck and threw the child out.

The verdict of the jury indicates that notwithstanding the greater number of witnesses testifying for the plaintiff, the jury believed the testimony of the driver of the truck; and upon a careful examination of all the evidence we do not think that the jury erred in this respect. Indeed, the record discloses that no witness was put upon the stand to deny the facts as related by the driver of the truck, and therefore on many material facts his evidence is uncontradicted. On the other hand, some of the witnesses for plaintiff admit having given a different version of some of the facts at the coroner's inquest, and other facts as related by them are in some respects improbable. The jury was evidently of the opinion that these boys were indulging in a "joy ride" across this intersection. The judgment cannot be reversed upon the ground that it is against the evidence.

It is next urged that the court erred in giving certain instructions requested by the defendant, and in particular instruction number 3 is complained of. By that instruction the court told

about 2 miles on foot; that he returned that he went about 2 miles
when he saw the Ford coming north on the sidewalk line; that he was to the
north of them; that he saw the car coming 30 feet away; that he
was at the sidewalk line, 2 feet back from the curb; that he was
on his knees, and went about 2 feet before he stopped; that the
truck didn't stop until it was at the sidewalk line on the south side of
the street; that the truck stopped north of the sidewalk line.
He says that the right front corner of his truck came in contact
with the Ford, the outside of the nose part of the chassis, and
there is just a sharp crack there; that the truck would not have
hit the Ford at all if the Ford had continued the way it was
going, but the driver tried to make a turn the same way the driver
of the truck was going, and that his rear fender hooked the front
corner of the truck and threw the axle out.
The driver of the truck testified that notwithstanding
the greater number of witnesses testifying for the plaintiff, the
jury believed the testimony of the driver of the truck; and upon a
careful examination of all the evidence we do not think that the
jury acted in this respect. Indeed, the record reflects that no
witness has put upon the stand so many facts as related by the
driver of the truck, and therefore on many material facts his evi-
dence is uncontradicted. On the other hand, some of the witnesses
for the plaintiff have given a statement which is not in
fact at the corner's instance, and other facts as related by them
are in some respects impossible. The jury was evidently of the
opinion that the facts were as stated in the testimony of the
defendant. The evidence would be sufficient to sustain the verdict that
it is correct and proper.

It is now requested that the court will set aside the
verdict and grant a new trial, and in particular instruct
the jury that it is concluded at. By that instruction the court will

the jury:

"The jury are instructed that the plaintiff cannot recover in this case against the defendant Royal Motor Delivery Company unless the jury believe that the plaintiff has proved by preponderance or greater weight of evidence the following propositions:

"1. That the death of the plaintiff's intestate was not brought about or proximately contributed to by any failure on the part of his surviving next of kin to exercise ordinary care for his safety at and just prior to the accident in question.

"2. That the defendant was guilty of the negligence charged by the plaintiff.

"3. That said negligence, if any, was the proximate and direct cause of the injuries and death of said intestate.

"If the jury find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence any of these propositions as stated or that he has failed so to prove any one of them, he cannot recover against the defendant."

Plaintiff says that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and Bank Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385; Chicago City Ry. Co. v. Fouhy, 196 Ill. 410, are cited. Our attention is further called to the fact that neither the father nor the mother was with plaintiff's intestate in the automobile at the time of the collision that while the brother Fred Dobruk was in the rear seat with his brother, there is no showing that anything he might have done could have been called contributory negligence; that even had he been guilty of negligence, it would not bar recovery by the parents of the plaintiff's intestate. As to the law, the Supreme court held contrary to plaintiff's contention in Hazel v. Reapaston-Danville B. Co., 310 Ill. 38, and Cheneorge v. Chicago City Ry. Co., 259 Ill. 424. We think there was no error in this instruction.

Complaint is also made of defendant's given instruction number 9, by which the court told the jury:

"You are instructed that the mere fact that a collision occurred between the automobile driven by Samuel Austa and a truck owned and operated by the Royal Motor Delivery Company

the jury:

"The jury are instructed that the plaintiff cannot recover in this case against the defendant Royal Motor Delivery Company unless the jury believe that the plaintiff has proved by a preponderance of greater weight of evidence the following propositions:

"1. That the death of the plaintiff's intestate was not brought about or proximately contributed to by any failure on the part of his surviving next of kin to exercise ordinary care for his safety at and just prior to the accident in question."

"2. That the defendant was guilty of the negligence charged by the plaintiff."

"3. That said negligence, if any, was the proximate and direct cause of the injuries and death of said intestate."

"If the jury find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence any of these propositions he is entitled to a verdict for the defendant."

"If the jury find that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

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"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

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"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

"The court further holds that it has been repeatedly held that the failure on the part of surviving next of kin to exercise ordinary care will not prevent a recovery by parents in a case of this kind, and that the law is as stated, the jury are directed to find in favor of the plaintiff."

and that the deceased received an injury in this collision resulting in his death, is not evidence of itself of negligence on the part of the defendant, Royal Motor Delivery Company."

While this instruction may be subject to some criticism, an instruction somewhat similar was approved in Chicago City Ry. Co. v. Allen, 169 Ill. 287; and we think the error, if it was error, in giving it was harmless.

Plaintiff also complains of defendant's instruction number 10, by which the jury was told:

"The court instructs the jury that if you believe from a preponderance of the evidence in the case that the injuries sustained by the plaintiff's intestate which resulted in his death were caused directly and proximately by the negligence of some party other than that of the defendant, Royal Motor Delivery Company, then your verdict should be for the defendant.

Plaintiff does not cite us to any case in which a similar instruction has been held erroneous, but argues that the meaning of the instruction was that the plaintiff could not recover from defendant even though defendant was negligent, if such negligence was not a direct and proximate cause of the death of plaintiff's intestate. We understand that such is the law. Unless the negligence proved is also the proximate cause of the injury complained of, a plaintiff cannot recover.

Complaint is also made of defendant's given instruction number 20, by which the court told the jury that the defendant "was not required to use the highest degree of care and caution or to be on its guard against the unusual, extraordinary and not-reasonably-to-be-expected; and if you believe from the evidence in this case that defendant's agent exercised reasonable care and caution in the operation of said automobile, such as would be exercised by ordinarily prudent persons under similar circumstances and that it was reasonably to be expected by the defendant's agent that an occurrence such as the one that resulted in the injury to the deceased would take place, then the defendant under the law is not liable

1. The defendant is not a member of the Communist Party, United States of America, nor is he a member of any other organization which advocates the overthrow of the Government of the United States by force or violence.

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Page 114, line 10: "The first of these is the fact that the system is not in equilibrium." (The word "equilibrium" is misspelled as "equilibium".)

.....

1. The above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

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I was such as the one that resulted in the injury to the deceased

for said occurrence and your verdict should be not guilty." The plaintiff says that this instruction has been condemned by the Supreme and Appellate courts and cites Aravitz v. Chicago City Ry. Co., 174 Ill. App. 152, and West Chicago St. Ry. Co. v. Petters, 196 Ill. 298. In the last named case an instruction, not by any means identical but in some respects similar, was refused and the court held that under the circumstances appearing in the case it was not error; this can hardly be considered condemning an instruction. In Aravitz v. Chicago City Ry. Co., *supra*, an instruction to the effect that the defendant street car company was not required to be at all times on its guard against dangers not reasonably to be expected, the unusual or extraordinary, was held to be misleading as applied to the facts in that case, the court pointing out that motormen of street cars were obliged to exercise more exacting attention when they approached street crossings in a crowded street where vehicles and pedestrians might be expected in front of them. The facts of that case are quite different from those appearing here, and the same may be said of Swanlund v. Rockford Ry. Co., 305 Ill. 339, another case where a street car was being run across an intersection in a city. Without approving the instruction, we do not think under the facts here appearing it would mislead the jury.

The plaintiff also complains that the court refused his requested instruction number 2, again citing West Chicago St. Ry. Co. v. Petters, *supra*, and Swanlund v. Rockford Ry. Co., *supra*. The rule of law which was apparently intended to be stated in this instruction was, we think, substantially covered by other instructions given, and the instruction is also in some respects ambiguous. It confused the plaintiff with plaintiff's intestate. A similar mistake was held to be error by the Supreme court in Leftus v. Chicago Ry. Co., 293 Ill. 475.

We are satisfied substantial justice has been done in this case and the judgment is therefore affirmed.

AFFIRMED.

O'Connor and McShurely, JJ., concur.

[illegible]

149 - 32130

SARAH KOHN,
Appellee,

vs.

SOL RUBIN et al. On Appeal
of SOL RUBIN,
Appellant.

6575a-114
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill seeking to have an affidavit made by Sol Rubin removed as a cloud upon her title to premises at the northwest corner of 12th street and Roman avenue, Chicago. Defendants David Kohn and Wilkin J. Kohn filed their appearance and consented to the entry of the decree in accordance with the prayer of the bill. Rubin filed an answer claiming certain rights in the property and nearly a year later filed a cross-bill, in which he set up his claims to various pieces of real estate to which Sarah Kohn held title. This cross-bill was subsequently amended. David and Wilkin J. Kohn filed joint and several answers, and Sarah Kohn filed an answer to the cross-bill, making general denials of the allegations of the cross-bill.

The cause was referred to a master for the purpose of ascertaining the rights of Rubin in the real estate. Afterwards the master returned the evidence together with his report, in which he found that the equities were with the complainant and recommended that a decree be entered in accordance with the prayer of her bill and that the cross-bill of Rubin be dismissed for want of equity. Objections and exceptions were filed, which were overruled, and the chancellor entered a decree in accordance with the recommendations of the master's report. Rubin appeals from this decree.

SARAH KORN
Appellant

ATTORNEY FROM CIRCUIT COURT

OF COOK COUNTY

DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill seeking to have the

affidavit made by her husband removed as a cloud upon her title

to premises at the northwest corner of 12th street and Roman

avenue, Chicago. Respondents David Korn and William J. Korn

filed their answers and consented to the entry of the decree

in accordance with the prayer of the bill. David filed an answer

admitting certain rights in the property and nearly a year later

filed a cross-bill, in which he set up his claim to certain

parts of that estate to which Sarah Korn held title. This cross-

bill was subsequently amended. David and William J. Korn filed

total and partial answers, and Sarah Korn filed an answer to the

cross-bill, which was amended by her. All parties to the

cross-bill.

The case was referred to a master for the purpose

of ascertaining the rights of David in the real estate. After

hearing the parties and the evidence, the master reported that

in view of the fact that the parties were in possession of

the premises, that a decree be entered in accordance with the prayer

of the bill and that the cross-bill of David be dismissed. The court

of equity, Chancery and Circuit Court were then, with very

much, and the decree was entered in accordance with the report

of the master. The decree was entered in accordance with the report

of the master.

The testimony before the master covers nearly a thousand pages and there are about twenty-eight exhibits. It would unduly extend this opinion if we should narrate the evidence with any fullness; we can only briefly refer to it.

Rubin claimed that Sarah Kohn, the complainant, held title to the real estate for the benefit of her brothers David and Wilkin J. Kohn. In order to avoid any question arising out of this fact and for the sake of shortening the record, it was stipulated that insofar as Rubin was concerned the complainant was bound by any rights which Rubin might have acquired through David Kohn.

The evidence was that Sol Rubin had been engaged in the real estate business in Chicago as an investor and broker since 1911; that he had known Wilkin J. Kohn since 1913 and met David Kohn in the early part of 1919, when Wilkin brought David to Rubin's office several times, where they had negotiations about various properties. Rubin says he told them that he could buy on very good terms and if they would come in with him, advance the money and buy the property, he would come in with them on a "50 - 50 basis," that Rubin would resell the real estate and save commissions by acting as broker both ways and they would split the profits; that David Kohn asked him, Rubin, if he would do that right along and Rubin was agreeable to do so. Rubin testified that he told the Kohns that he was not in a position to take title to any property because there were certain judgments against him, and David said he would have his sister Sarah Kohn take title, she being a spinster. Rubin further testified that at a meeting in March, 1919, at his office, an oral agreement was made by Rubin with David and Wilkin J. Kohn that he would try to get real estate for as low prices as possible and would then try to turn over the contracts as soon as the purchases were made and they would divide the profits; that David Kohn told him to go ahead on this plan and he would see

The testimony before the master covers nearly a

thousand pages and there are about two hundred exhibits. It would

undoubtedly extend this opinion if we should narrate the evidence with

us. However, we can only briefly refer to it.

Rubin claimed that Sarah Kahn, the complainant, said

little to the real estate for the benefit of her brothers David and

William J. Kahn. In order to avoid any question arising out of this

fact and for the sake of shortening the record, it was stipulated

that insofar as Rubin was concerned the complaint was based on

any rights which Rubin might have acquired through David Kahn.

The evidence was that Rufus Rubin had been engaged in

the real estate business in Chicago as an investor and broker since

1911; that he had known William J. Kahn since 1915 and met David

Kahn in the early part of 1919, when William brought David to

Rubin's office several times, where they discussed various

various properties. Rubin says he told them that he could buy on

very good terms and if they would come in with him, advance the

money and let him handle it, he would make it worth their

"50 - 60 cents," that Rubin would receive the real estate and have

consideration by acting as broker both ways and they would split the

profits; that David Kahn asked him, Rubin, if he would do that right

along and Rubin was responsible to do so. Rubin testified that he

told the Kahns that he was not in a position to take title to any

property because there were certain judgments against him, and David

said he would have his sister Sarah Kahn take title, she being a

spinster. Rubin testified that at a meeting in March,

1919, at his office, an oral agreement was made by Rubin with David

and William J. Kahn that he would try to get real estate for as low

prices as possible and would then try to turn over the contracts as

soon as the purchases were made and they would divide the profits.

That David Kahn told him to go ahead on this plan and he would not

that there was plenty of money on hand to make the purchases, that anything Wilkin Kohn agreed to buy was satisfactory to him, David; that Rubin said anything gained in commissions would remain in the property for the benefit of all, and David Kohn said this was satisfactory to him.

David Kohn testified that he lived in Billings, Montana. He denied categorically all of the testimony given by Rubin with reference to making the aforesaid agreements, denied that he ever agreed to advance any money or purchase property and divide the profits, and denied that it was agreed that Wilkin Kohn would handle the deals.

Wilkin J. Kohn testified that he lived in Chicago; that he first met Rubin in 1913 when he purchased some vacant lots on the West Side through Rubin's office; that he occasionally met Rubin thereafter and in 1919 on one occasion introduced his brother David to Rubin as a broker for the seller of some lots; that he told David that the lots were worth the money and David thereupon signed a contract for the purchase of the same. He denied any and all conversations with Rubin in which it was agreed that he or his brother David should advance moneys for the purchase of various properties on a 50-50 basis; denied that there was any conversation in which David Kohn asked Rubin whether or not he would associate with him right along and that he, Wilkin, could handle all the details and Rubin would act as a broker both ways and when the property was sold the profits would be divided. Wilkin J. Kohn denied any conversation relative to any agreement under which a division of the profits and interests in the property purchased was to be made between David and Wilkin J. Kohn and Rubin; that in April, 1919, he had a conversation with Rubin in the latter's office with reference to certain lots on Roosevelt Road and the division between them of a commission arising out of a sale; that he told Rubin that he had a buyer for

that there was plenty of money on hand to make the purchase, that
anything William Kahn asked to buy was subject matter to him, David;
that Kahn said any and every kind of commission would remain in the
property for the benefit of all, and David Kahn said this was entire-
ly correct to him.

David Kahn testified that he lived in Williams, Montana.
He denied categorically all of the testimony given by Rubin with
reference to making the proposed agreement, denied that he ever
agreed to advance any money or business property and divide the
profits, and denied that it was agreed that William Kahn would handle
the deal.

William J. Kahn testified that he lived in Chicago; that
he first met Rubin in 1915 when he purchased some vacant lots on
the West Side through Rubin's office; that he occasionally met Rubin
thereafter and in 1918 on one occasion introduced his brother David
to Rubin as a broker for the offer of some lots; that he told

Rubin that the lots were worth the money and David thereupon signed
a contract for the purchase of the lots. He denied any and all con-
nection with Rubin in this. He denied that he or his brother
David would advance money for the purchase of vacant lots
on a West Side lot and was not involved in this.

David Kahn said that when he met his brother William J. Kahn
that time he told him that he had a little money and
he would act as a broker both ways and when the property was sold
the profit would be divided. William J. Kahn denied any connection
with this. He denied that he or his brother would advance money
for the purchase of vacant lots on the West Side. He denied that
he or his brother would advance money for the purchase of vacant
lots on the West Side. He denied that he or his brother would
advance money for the purchase of vacant lots on the West Side.

them, but he had never received his half of the commission; that he asked Rubin if he had received a commission and Rubin replied that he would collect the same and pay Wilkin Kohn his half in a few days.

Under this evidence it is difficult to see how Rubin could maintain his claim of an interest in the property or the proceeds of any sale of the same. He does not claim that he had any agreement in writing. His claim rests solely on an alleged oral agreement, the making of which is supported by his testimony alone and denied directly by David and Wilkin Kohn. Upon this evidence alone the master, having seen and heard the witnesses testify, would have been justified in holding that Rubin had failed to prove the agreement he claims to have.

There are, however, a number of other facts in evidence showing an attitude of Rubin's entirely inconsistent with his claim of interest in the property. The property described in the original bill of complaint was at the northwest corner of Roosevelt road and Homan avenue. It was with reference to this property that Rubin filed his affidavit, which complainant sought to have removed as a cloud on the title. Rubin testified that he submitted this property to Wilkin Kohn in May or June, 1919; that he, Rubin, purchased this himself and several days later sold it to Hyman Goldberg; that later he took an option to repurchase from Goldberg and that the contract of purchase was signed by Sarah Kohn by Wilkin Kohn, her agent. Rubin testified that it was agreed that his interest in the property should be one-third. Similar transactions were claimed with reference to properties at 4031-35 West Madison street, at 4037 West Madison street, at the southwest corner of Douglas boulevard and Turner avenue, and at Roosevelt road and Millard avenue.

It was shown that a petition to have Rubin declared an involuntary bankrupt was filed August 19, 1922, and that he testified before Referee Eastman on November 28, 1922, that outside of

two pieces of property not involved herein, the only property he had was a one-third interest in the northwest corner of Roosevelt road and Roman avenue. He not only made no claim to any interest in any of the other pieces of property in which now by his cross-bill he is claiming an interest, but testified that he had no interest therein. Before the referees he was specifically asked as to the nature of his interest in the Roosevelt road and Roman avenue property, and he stated: "I had my commission coming in the transaction; that was the agreement;" and that this commission was "about \$2,000 or a third interest, either one or the other."

It was also shown that Rubin filed two lawsuits against David Kohn claiming commissions of \$500 as a broker for the sale of the property at Roosevelt road and Millard avenue. The statement of claim was sworn to by Rubin. He also brought a suit claiming a broker's commission of \$465 on the sale of the property on West Madison street to Sarah Kohn; he swore to this in his statement of claim. He also sued out an attachment writ against David Kohn on the ground of non-residence, claiming that Kohn was indebted to him to the amount of \$7,000. He testified that the only moneys received by him in any of his deals with the Kohns were portions of commissions, one on the so-called Israel Cohen deal and the other on the Sachs transaction, which is the property at Roosevelt road and Millard avenue, but it was shown that Rubin had testified in another case that he had sold the Roosevelt road property and that he expected to get a commission in connection with these transactions; that he was supposed to get a commission from Kohn, who was buying. There was also evidence showing that in another transaction a check was given by Sarah Kohn to Rubin in payment of commissions.

It would make this opinion entirely too long if we should attempt to set forth all the inconsistencies and contradic-

statements in the testimony of Rubin. His position of claiming commissions from the Hehns is wholly inconsistent with any claim of interest in the properties and is consistent only with the conduct of a broker in these various transactions. A large number of decided cases have been cited by both sides, but we do not refer to them for the reason that the essential question is one of fact. The burden was upon the cross-complainant to prove the allegation of his cross-bill that he had an interest in the real estate mentioned. After giving as thorough consideration to the evidence in the record as is possible considering the mass of detail involved, much of which is irrelevant, we hold that the master properly found that the alleged oral agreement failed of proof and that the affidavit of Rubin claiming an interest in the property mentioned in the original bill constituted a cloud on the title which complainant is entitled to have removed. The chancellor was justified in over-ruling the exceptions to the master's report and in entering the decree in accordance with its recommendations. It is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

HENRIK LAMM, EMIL LAMM and
BEN LAMM,

Appellees,

vs.

AMSTER FURNITURE COMPANY, a
Corporation, Successor to
Bernstein Furniture Company,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover rental for the use and occupation by defendant of a garage or storeroom belonging to plaintiffs at the rear of premises number 1645 West Chicago avenue, Chicago, for August, 1923, to and including March, 1924. Upon trial by the court the issues were found against the defendant and plaintiffs' damages were assessed at \$200. Defendant's brief should have given us information as to the judgment but does not do so. See Rule 19 of this court.

The defense seems to be that in April, 1912, a written lease was executed, by which Louis Fath as lessor leased to the defendant the barn at the rear of the premises at number 1645 West Chicago avenue and the premises at numbers 1650-52 West Chicago avenue, and defendant claims that it was occupying the garage in question under this lease. Plaintiffs bought the premises at number 1645 West Chicago avenue July 14, 1923. At this time defendant was occupying the premises in the rear and continued to occupy them thereafter without paying rent to plaintiffs. The lease offered in evidence by defendant did not cover number 1645 West Chicago Avenue, the property owned by plaintiffs. As it appears, therefore, that defendant was using and occupying premises belonging to plaintiffs, without paying them rent therefor, they were entitled to recover a

1642

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Plaintiff, vs.
Defendant.

Plaintiff brought suit to recover rental for the use and occupation by defendant of a garage or storehouse belonging to plaintiff at the rear of premises number 1848 West Chicago Avenue, Chicago, for August, 1933, so and including March, 1934.

Upon trial by the court the issues were found against the defendant and plaintiff's damages were assessed at \$200. Defendant's brief would have given an instruction as to the judgment but does not.

Plaintiff brought suit to recover rental for the use and occupation by defendant of a garage or storehouse belonging to plaintiff at the rear of premises number 1848 West Chicago Avenue, Chicago, for August, 1933, so and including March, 1934.

Upon trial by the court the issues were found against the defendant and plaintiff's damages were assessed at \$200. Defendant's brief would have given an instruction as to the judgment but does not.

The doctrine enunciated in that in April, 1912, a written lease was executed, by which lands both as fence leased to the defendant the rear of the premises at number 1848 West Chicago Avenue and the premises at numbers 1880-82 West Chicago Avenue, and defendant claims that it was occupying the garage in question under this lease. Plaintiff's bought the premises at number 1848 West Chicago Avenue July 14, 1933. At this time defendant was occupying the premises in the rear and continued to occupy them thereafter without paying rent to plaintiff. The lease offered in evidence by defendant did not cover number 1848 West Chicago Avenue, the property owned by plaintiff. As it appears, therefore, that defendant was using and occupying premises belonging to plaintiff.

reasonable amount for the use and occupation of the same.

Some objection is made to the evidence as to the rental, but this was sufficiently proven. The finding of the court was substantially less than the amount ^{at} which the witnesses fixed the reasonable rental.

The judgment is affirmed.

AFFIRMED.

Hatchett, F. J., and O'Connor, J., concur.

THESE ARE THE ONLY TWO CASES IN WHICH THE
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RUTH RAYMOND, for the Use of
SAM CHALIP,

Appellee,

vs.

THE GIRARD FIRE AND MARINE
INSURANCE COMPANY, a Corporation,
Garnishee,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHANEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Girard Fire and Marine Insurance Company, garnishee, from a judgment against it upon trial by the court in the sum of \$1576.82.

Plaintiff filed interrogatories which the garnishee answered, saying that it did not have in its possession, at the date of service of the writ, any money, property or effects of any kind belonging to Ruth Raymond or in which she was interested.

Upon the trial it developed that Ruth Raymond and her husband conducted a dry goods business at No. 3136 West Roosevelt Road, Chicago; that through an insurance broker they procured fire insurance on the contents of the store in eight companies, one of which was the Girard Company for \$2500; this policy was for a term of one year, beginning November 23, 1925. The Girard Company claimed, and introduced evidence tending to show, that in May, 1926, it cancelled said policy. July 19, 1926, a fire occurred at the Raymond store. At this time there was fire insurance aggregating \$15,000 on the store, exclusive of the Girard policy. A Mr. Siegel, an insurance adjuster, was employed by Mrs. Raymond to adjust the loss for a compensation of ten per cent of the amount of the loss claims which she would receive from the companies. Siegel met the adjusters of the companies, other than the Girard, and adjusted the

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JULY 19 1935
U.S. DEPT. OF JUSTICE
DIVISION OF INVESTIGATION
WASHINGTON, D.C.

TO THE HONORABLE CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GRAND JURY AND
THE COURT
IN RE: ALBERT J. BLOOM
ALLEGEDLY A FUGITIVE
FROM JUSTICE

JUSTICE DEPARTMENT DELIVERED THE ORDER OF THE COURT.

This is an appeal by the Grand Jury and Justice Department
from a judgment rendered by the Court in the case of
the sum of \$1500.00.
Plaintiff filed interrogatories which the defendant
answered, saying that it did not have in its possession, at the
date of service of the writ, any money, property or effects of any
kind belonging to Albert J. Bloom or in which he was interested.
Upon the trial it developed that Albert J. Bloom and his
husband conducted a dry goods business at 20, 21st Street, New York
City, Chicago; that through an insurance broker they procured life
insurance on the contents of the store in eight companies, one of
which was the Grand Company for \$2500; this policy was for a term
of one year, beginning November 22, 1934. The Grand Company
admitted, and introduced evidence tending to show, that in May, 1935,
it cancelled said policy. July 19, 1935, a fire occurred at the
store. At this time there was life insurance outstanding
\$15,000 on the store, exclusive of the Grand policy. A Mr. Bloom,
an insurance adjuster, was employed by Mrs. Bloom to adjust the
loss for a compensation of ten per cent of the amount of the loss
claim which she would receive from the companies. Bloom met the
adjusters of the companies, other than the Grand, and adjusted the

loss and damages at \$6,000, which was paid by the other companies. The Girard insurance policy was returned to the Girard Company for cancellation. The Girard Company was not asked to and did not participate in the adjustment of the loss, neither did the assured nor her adjuster suggest to the other companies that the Girard policy be figured in the settlement.

The policy provided that the assured must give immediate notice in writing of any loss and furnish proofs of loss within sixty days after a fire, and that no suit could be instituted unless this provision of the policy was complied with. No notice of any claim under the policy was given to the Girard Company until October 19, 1926, which was more than sixty days after the loss occurred.

It is necessary to notice only one of the points presented. The evidence discloses that the claim against the Girard Company was contingent and unliquidated and therefore is not subject to garnishment. In Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, the court said:

"If the indebtedness is owing without uncertainty or contingency at the date of the answer, the debt is subject to garnishment."

The instant claim was contingent on the life of the policy, uncertain as to whether under its limiting terms the insured could prosecute a claim, and unliquidated as to the amount, if any, payable thereunder.

In the recent case of Shraiberg Mfg. Co. v. Boston Ins. Co., 246 Ill. App. 196, involving claims under insurance policies which the plaintiff attempted to garnish, the opinion goes into the question extensively and arrives at the conclusion that:

"The law in this State is clear that a garnishee proceeding will not lie where the claim is contingent or unliquidated or is not ascertainable by computation except by verdict of a jury."

This was followed in Wilson Avenue Bathing Beach Co., a corporation, for use of Lydston v. North British & Mercantile In-

1930 and 1931, which was paid by the other companies.
The direct insurance policy was returned to the Direct Company for
cancellation. The Direct Company was not asked to and did not
participate in the adjustment of the loss, neither did the assured
nor her attorney suggest to the other companies that the Direct
policy be figured in the settlement.

The policy provided that the assured must give immediate
notice in writing of any loss and furnish proofs of loss within sixty
days after a fire, and that no suit could be instituted unless this
provision of the policy was complied with. No notice of any claim
under the policy was given to the Direct Company until October 19,
1938, which was more than sixty days after the loss occurred.
It is necessary to notice only one of the points
presented. The evidence discloses that the claim against the
Direct Company was not made until at least October 19, 1938.
The Direct Company was not notified until October 19, 1938.

"If the indebtedness is being without uncertainty or
contingency at the date of the answer, the debt is subject
to payment."

The instant claim was contingent on the life of the
decedent, uncertain as to whether under its limiting terms the in-
sured could prosecute a claim, and undischarged as to the amount,
if any, payable thereunder.

In the recent case of Shelburne v. Col. V. Haring

1938, 408 Ill. App. 126, involving claims under insurance poli-
cies, the court stated: "The question was raised and arrived at the conclusion that:
"The law in this State is clear that a guarantee process, and
will not allow the claim to contingent or undischarged or
is not ascertainable by computation except by verdict of a jury."

This case is cited in Shelburne v. Haring, 408 Ill. App. 126.
The court in Shelburne v. Haring, 408 Ill. App. 126, stated:

urance Co., No. 31825 this court, opinion filed January 18, 1928.

We are in accord with the statement of the rule in these cases and therefore the judgment of the Municipal court in the instant case is reversed and the cause remanded with directions to dismiss the garnishment proceedings.

REVERSED AND REMANDED
WITH DIRECTIONS.

Mitchell, P. J., and O'Connor, J., concur.

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J. LISTON MAU, V. G. DUNNINGTON,
W. F. SMITH, TRUSTEES MANUFACTURERS
FINANCE TRUST,

Appellees,

vs.

H. O. DANENBERG,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment for \$2667.89 entered against him after a trial by the court.

Judgment was originally entered by virtue of the power to confess judgment in a promissory note alleged to be signed by defendant. The note was secured by a chattel mortgage of even date, April 26, 1926. The West Madison State Bank was garnished and filed an answer admitting an indebtedness to the defendant in the sum of \$90.84, and judgment against the garnishee was entered for this amount and satisfied. Subsequently, on petition and affidavit, the judgment against defendant was vacated and he was permitted to defend, with the result of judgment for the plaintiff.

Defendant denies that he signed the note in question and the decisive point is whether or not his signature thereto is a forgery. The original note was left in the files at the time of the entry of the judgment by confession but before the case was tried it had disappeared. Plaintiff sought to prove that the signature on the chattel mortgage, which referred by its terms to the note, was the genuine signature of the defendant. Much evidence was heard on this point. The signature card of the West Madison State Bank bearing the admitted signature of the defendant and also certain original deposit slips were introduced in evidence. Defend-

and to entirely re-organize the Executive and re-organize the

ant admitted that this card and the slips bore his genuine signature.

Mr. Ennis, a competent handwriting expert, from a comparison of these genuine signatures with the signature on the chattel mortgage, testified that they were made by the same person. Also defendant's signature on the affidavit of merits was compared with that on the chattel mortgage and pronounced by the expert to have been made by the same person. Ennis went into the matter carefully and in detail, giving convincing reasons for his conclusions. The trial court offered to permit the defendant to produce experts to testify as to the signatures and offered to name an expert of much experience in such matters, but defendant declined to avail himself of any expert testimony. The chattel mortgage and the original documents bearing the genuine signatures of defendant were introduced in evidence and are before this court.

By the weight of the evidence produced upon the trial and upon an inspection of the documents in the record, we hold that it was amply proven that the chattel mortgage was signed by the defendant. In many particulars, which it is unnecessary to relate, defendant's testimony was not convincing.

The chattel mortgage refers to and describes the note in question. As it is clear that the chattel mortgage was signed by the defendant, the conclusion is inevitable that the note therein referred to was also signed by the defendant.

Defendant's affidavit supporting his petition to vacate the judgment states that he never received any consideration for the note upon which suit is brought, and some argument is made upon this point. It is sufficient answer to say that this defense is inconsistent with the plea that defendant did not execute the note.

The statute permitting the defense of no consideration is allowable only when "it shall appear that such instrument was made." Cahill's

1997

and admitted that this was the only time he ever saw the white girl.

Illinois Statutes, chap. 98, paragraph 10. However, it was amply proven that plaintiff was a holder before maturity in good faith and for value without any notice of any claimed infirmity in the instrument or defect in the title of the person negotiating it.

The judgment is affirmed.

AFFIRMED.

Ketchett, P. J., and O'Connor, J., concur.

...the plaintiff was a holder before maturity in good faith
and the same without any notice of any claimed infirmity in the
instrument or defect in the title of the person negotiating it.
The judgment is affirmed.

ATTESTED

W. J. and O'Connor, J., concur.

ROBERT SELIGMAN,
Defendant in Error,

vs.

SLATER & SLATER, Inc.,
Plaintiff in Error.

52479A 642⁴
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHERLY DELIVERED THE OPINION OF THE COURT.

Plaintiff was employed by defendant to sell its merchandise in certain territory under an oral contract. He brought suit for commissions on merchandise sold. Upon trial he had a verdict for \$725, upon which judgment was entered and from which defendant appeals.

In order to prove the amount of his sales plaintiff was permitted to introduce in evidence certain order books. It was claimed that these were improperly admitted, as they are copies only and therefore not the best evidence. These order books were furnished to plaintiff by defendant and the entries were made by him. When an order was taken, plaintiff would write the same in the book, which was so arranged that one writing would make three copies by the use of carbon; one copy was given to the customer, one mailed to the defendant and the third was kept by the plaintiff. The argument of defendant is based upon the assumption that the order received by it was the original and the duplicates retained by the plaintiff, which were the ones introduced in evidence, were copies. While, for convenience, one of such papers may be called a copy and another an original, yet where they are made simultaneously in one writing, they are in fact and in law originals. Wurlitzer Co. v. Dickenson, 153 Ill. App. 36, affirmed in 247 Ill. 27. In Chicago & E. I. S. & Co. v. Zapp, 209 Ill. 339, it was held that a letter press book

2248 T.A. 642

REPORT TO JUDICIAL COUNCIL

WATKINS & LATTIN, Inc.
Residence in New York

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff was employed by defendant to sell its

merchandise in certain territory under an oral contract. It

brought suit for commission on merchandise sold. Upon trial

he had a verdict for \$722, upon which judgment was entered and

from which defendant appeals.

In order to prove the amount of his sales plaintiff

was permitted to introduce in evidence certain order books. It

was claimed that these were improperly admitted, as they are

copies only and therefore not the best evidence. Those order

books were furnished to plaintiff by defendant and the entries

were made by him. When an order was taken, plaintiff would write

the same in the book, which was so arranged that one writing

would make three copies by the use of carbon; one copy was given

to the customer, one mailed to the defendant and the third was

kept by the plaintiff. The statement of defendant is based upon

the assumption that the order received by it was the original and

the duplicates retained by the plaintiff, which were the ones

introduced in evidence, were copies. While, for convenience, one

of such papers may be called a copy and another an original, yet

where they are made simultaneously in one writing, they are in

fact one and the same writing.

And, as, although in fact one writing, they are in

law, they are treated as separate writings.

record. Plaintiff having made these entries himself and having testified that he performed the services there charged, that he made the entries contemporaneously and that the entries were correct, they were properly admitted in evidence. Houss v. Beak, 141 Ill. 290.

that
Defendant's next contention is/there was an account stated between the parties and that the court erroneously refused to direct a verdict in favor of the defendant on this ground. No account stated was pleaded as a defense; and there was no evidence showing an account stated which would justify an instruction based on this theory. There is some evidence that defendant sent plaintiff monthly statements. We cannot determine what these statements contained, as they are not in the abstract. Plaintiff made some reply to these, but when he attempted to give the contents of his letter, objections thereto were sustained.

Defendant claims that the verdict and judgment are against the weight of the evidence. Plaintiff testified that his contract covered all orders taken in certain territory upon which he was to receive 7½% commission and that defendant agreed to ship 90% of his orders. Frank Slater, secretary of defendant, gave testimony in two depositions, both of which were read in evidence. In his first deposition he testified that plaintiff was entitled under their agreement "to commission on all amounts that we sold in the territory awarded him." In the second deposition he contradicts this by saying, "It is not true that we agreed to pay Seligman commission on all sales procured by him or otherwise in his territory." In the second deposition he also denied that defendant had agreed to ship 90% of the orders taken by plaintiff.

Plaintiff introduced letters from the defendant to himself tending to support his testimony as to the orders. The

testified that he performed the services there charged, that he made the parties contemporaneously and that the entries were correct, they were properly admitted in evidence. House v. Unruh, 100 Cal. 115, 34 P. 225, 18 P.S. 100.

Defendant's next contention is there was an account stated between the parties and that the court erroneously relied is direct a verdict in favor of the defendant on this ground. The account stated was pleaded as a defense; and there was no evidence showing an account stated which would justify an instruction based on this theory. There is some evidence that defendant sent plaintiff monthly statements. We cannot determine what those statements contained, as they are not in the abstract. Plaintiff made some reply to those, but when he attempted to give the contents of his letter, objections thereto were sustained.

Plaintiff introduced letters from the defendant to

defendant had agreed to this Q&A at the orders taken by plaintiff.

his testimony." In the second question he was denied that

Belgian commission on all sales procured by him or otherwise in

fradulent this by saying, "It is not true that we agreed to pay

in the testimony awarded him." In the second question he com-

under their agreement," no commission on all amounts that we sold

In his first deposition he testified that plaintiff was entitled

testimony in two depositions, both of which were read in evidence.

Q&A of his entire. Frankly stated, secretary of defendant, gave

he was to receive 7% commission and that defendant agreed to this

contract covered all orders taken in certain territory upon which

against the weight of the evidence. Plaintiff testified that his

own direct statement giving that the verdict was judgment was

writing of these letters was not denied or repudiated at the trial and no attempt was made to explain them.

The variant claims of the parties were properly considered by the jury and we find no substantial reason for disagreeing with its conclusion; and as there was no reversible error on the trial the judgment is affirmed.

AFFIRMED.

Ketchett, P. J., and O'Connor, J., concur.

NOTE: All the questions are asked in the same way as you will find them in the test.

Small amounts of these pure agents are also

— *How much more do you believe in the American cowboy than*

...and the fact that the ...

no other evidence on any event on the [redacted] and [redacted]

the first, the second is different.

32453

JOHN J. PHINE,
Appellant,

vs.

JOHN PALUCH,
Appellee.

6-248-12-5
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order allowing the defendant's motion to vacate and set aside a judgment against him for \$244.10 entered upon the verdict of a jury.

Judgment was originally entered by confession by virtue of a power of attorney in two promissory notes signed by the defendant. Defendant filed his motion and petition to open said judgment and for leave to defend, which was allowed, and on January 19, 1926, filed a demand for a jury trial. June 30, 1927, the case was reached on the call for trial, but defendant was not present and after a hearing the jury returned a verdict for the plaintiff and judgment followed. More than thirty days thereafter, on August 18, 1927, which was subsequent to the term at which the judgment was entered, defendant filed a petition to vacate and set aside the judgment of June 30th, which motion was allowed; from this plaintiff appeals.

The petition of defendant stated that the firm of Wolf & Love represented him; that the matter was placed in the hands of Alexander Wolf of said firm for trial; that Wolf's mother died March 9, 1927, and that by reason thereof he was unable to keep in touch with cases assigned to him, including the above entitled case; that "on June 21, 1927," Wolf was out of the city on account of his health. Defendant asked that pursuant to Section 21 of the Municipal Court act the judgment be vacated and set aside and that all orders entered "June 21, 1927," be vacated and set aside.

348 I.A. 642

OFFICE OF THE CLERK OF THE COURT

OF CHICAGO

JOHN T. BROWN

Applicant

THE COURT HAS REVIEWED THE OPINION OF THE COURT

This is an appeal by Plaintiff from an order allowing

the defendant's motion to vacate and set aside a judgment against

him for \$214.10 entered upon the verdict of a jury.

Judgment was originally entered by consent of

virtue of a power of attorney in two promissory notes signed by

the defendant. Defendant filed his motion and petition to open

said judgment and for leave to defend, which was allowed, and on

January 10, 1936, filed a demand for a jury trial. June 30, 1937,

the case was reached on the call for trial, but defendant was not

present and after a hearing the jury returned a verdict for the

plaintiff and judgment followed. More than thirty days thereafter,

on August 10, 1937, defendant was arrested on the writ of

judgment was entered, defendant filed a petition to vacate and set

aside the judgment of June 30th, which motion was allowed; from

this plaintiff appeals.

The petition of defendant stated that the firm of

Walt & Love represented him; that the matter was closed in the

hands of Alexander Wolf of said firm for trial; that Wolf's

mother died March 9, 1937, and that by reason thereof he was

unable to keep in touch with cases assigned to him, including the

above entitled case; that on June 21, 1937, Wolf was out of the

city on account of his health. Defendant asked that pursuant to

Section 21 of the Municipal Court act the judgment be vacated and

and set aside.

It is well settled that a judgment in a court of law will not be set aside after term time unless it appears not only that the judgment debtor has a good and meritorious defense, but that the judgment was not caused by any lack of diligence on the part of the defendant. American Surety Co. v. Bliss, 214 Ill. App. 463. It is also well settled that an attorney's neglect or want of diligence is binding on his principal. Imbrie v. Bear, 230 Ill. App. 155; Staunton Coal Co. v. Wank, 197 Ill. 369.

A mere glance at the petition shows a lack of diligence on the part of defendant's attorney. While the death of his mother in March is of course regrettable, yet it does not explain why he was not in attendance when the case was called for trial on the following June 30th. The only explanation attempted is that the attorney was out of town on account of his health on June 21st. There is no relevancy as to this date, for the case was called for trial and the judgment entered on June 30th. On account of the failure to show due diligence, the motion to vacate the judgment should have been denied. The defendant does not appear in this court to question this appeal.

For the reasons above indicated the order of the Municipal court entered August 18, 1927, vacating and setting aside the judgment of June 30, 1927, is reversed and the judgment entered on behalf of the plaintiff June 30th is confirmed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

It is well settled that a judgment in a court of

law will not be set aside after term time unless it appears that

only that the judgment debtor has a good and meritorious defense

but that the judgment was not entered by any lack of diligence on

the part of the defendant. Amber v. ...

app. 402. It is also well settled that an attorney's neglect or

want of diligence in pleading on his principal. Imperial v. ...

220 Ill. App. 155; ... v. ..., 197 Ill. 260.

A more glaring at the position shown a lack of diligence

comes on the part of defendant's attorney. While the death of

his mother in March is of course regrettable, yet it does not

explain why he was not in attendance when the case was called.

For trial on the following June 30th. The only explanation at-

tempted is that the attorney was out of town on account of his

death on June 1st. There is no testimony as to this date. For

the case was called for trial and the judgment entered on June

30th. On account of the failure to show due diligence, the motion

to vacate the judgment should have been denied. The defendant

has not appear in this court to question this appeal.

At the time the reasons above indicated the order of the

court was entered on June 21st. The court was called

and the judgment was entered on June 30th. The court was called

and the judgment was entered on June 30th. The court was called

RECORDED

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RECORDED IN THE COURT OF COMMON PLEAS

421

121 - 32062

ISADORE WACKEVICH,
Appellee,

vs.

LOUIS NEIMAN and ELIAS NEIMAN,
Trading as NEIMAN BROTHERS,
Appellants.

65 E/a
343
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover \$235.26 claimed as a balance due him for sugar sold and delivered to the defendants. There was a verdict and judgment in plaintiff's favor for the amount of his claim, and the defendants appeal.

Plaintiff offered evidence tending to show that in September, 1924, one of the defendants called at his place of business and bought 111 bags of granulated sugar and 10 barrels of powdered sugar at \$6.55 per hundred pounds; that 111 bags and one barrel were delivered on September 2nd and 9 barrels on September 5, 1924; that the sale was a cash transaction; that on September 6th plaintiff received from defendants a check for \$750; that he had demanded payment of the balance but that defendants refused to pay on the ground that the nine barrels that were delivered on September 5th were of no value.

Plaintiff's theory of the case is that the sugar had been sold "as is," while defendants' contention is that it had been sold by sample and that the nine barrels of sugar were not in accordance with the sample. The defendants' position further was that when they paid the \$750 by check on September 6th they wrote upon the back of the check, "In full payment of all claims and demands to date," and that since plaintiff accepted the check, no further recovery can be had, the theory apparently being that there was an

There was a variety of subjects. The following are the subjects of the papers read at the meeting:

* Printed in the U.S.A. by the American Psychological Association, 1200 17th St., N.W., Washington, D.C. 20036

How long did this situation last and how did it change over time?

no fact, no statement, no act, no law and no rule, no

accord and satisfaction. The court gave an instruction to the jury to the effect that if they believed from the evidence that the endorsement was on the check when it was given by the defendants to the plaintiff, then they must find the issues for the defendants. It does not appear at whose request any of the instructions were given, except that we must assume that this instruction was given at the request of the defendants. The jury found in favor of the plaintiff for the full amount of the claim. This was contrary to the instruction just mentioned. There was no dispute in the evidence but that the endorsement was on the check at the time it was given; but the evidence further shows that there was no dispute between the parties as to the amount due.

The defendants' testimony was that when they gave the plaintiff the check for \$750 it was to be in full of all claims and that plaintiff agreed to this and that he would take back the nine barrels of sugar, so that there was an entire agreement between the parties; that on the theory of defendants' evidence there was no dispute between the parties and therefore the endorsement on the check would not have any effect as to whether or not there was an accord and satisfaction. It is only where the evidence shows there was a bona fide dispute between the parties as to the amount due that the acceptance of such a check would constitute an accord and satisfaction. Snow v. Griesheimer, 230 Ill. 106.

Plaintiff's evidence was to the effect that he called up the defendants and requested payment for all of the sugar; that one of the defendants stated that they were hard up and were able to pay only \$750 at that time but would pay the balance shortly; that the next day plaintiff received the check through the mail and it was about a week afterwards that the defendants complained of the quality of the nine barrels of sugar. It appears from the evidence that there was no dispute between the parties when the \$750 check

was received by plaintiff. The instruction should not have been given.

All of the evidence shows without dispute that plaintiff delivered but 111 bags of sugar and not 121 bags, as claimed in the statement of claim. There was so much perjury in this case that we are not surprised that the jury was misled as to the item of 10 bags. We will not stop to analyze the evidence, but it is sufficient to say that in a great number of particulars it is in hopeless conflict and perjury was numerous times committed. The jury saw and heard the witnesses and believed plaintiff's version of the matter, and we would not be warranted in disturbing the verdict. It is undisputed that plaintiff did not deliver to the defendants 10 bags of sugar, and there were 1,000 pounds of sugar in these 10 bags, which at \$6.65 per hundred pounds amounts to \$66.50. The verdict is too much by this sum. The evidence on this point being undisputed, we will correct the judgment here. (Sherriff v. Kromer, 232 Ill. App. 586.) The correct amount due, therefore, is \$168.75.

The defendants have filed a brief in this court of more than 71 pages, many pages of which are mere copies of the abstract. Numerous points are made. The instructions are copied in full but no argument is made that they are wrong except that counsel state that the court erred in giving them. The brief entirely disregards rule 19 of this court. All that needs to be said in a case of this character could certainly have been included in a ten page brief, and such a brief would have been of some assistance to this court. Numerous complaints are made as to the rulings of the court and as to the conduct of plaintiff's counsel during the trial. It would serve no purpose to discuss them. While there is merit in some of the contentions made by the defendants, yet the issue in the case is simple and we are certain

was presented by plaintiff. The investigation should not have been

the jury. All of the evidence given without exception that plaintiff
with delivered but all pages of copy and not all pages, as claimed

in the statement of claim. There was no such perjury in this
case that we are not surprised that the jury was misled as to the
fact of 10 pages. We will not stop to analyze the evidence, but it

is sufficient to say that in a great number of particulars it is
in complete conflict and perjury was numerous times committed.
The jury saw and heard the witnesses and believed plaintiff's

version of the matter, and we would not be warranted in dis-
missing the verdict. It is undisputed that plaintiff did
not deliver to the defendants 10 pages of copy, and there were

1,000 pages of copy in those 10 pages, which at \$4.00 per
hundred pages amounts to \$400.00. The verdict is too much by
this sum. The evidence on this point being undisputed, we will

correct the statement here. (That the amount was \$400.00.)
The correct amount due, therefore, is \$400.00.
The defendants have filed a brief in this case.

It is not a brief, and we will not consider it as such.
It is a brief, and we will not consider it as such.
It is a brief, and we will not consider it as such.

in fact but no response is made that they are wrong except that
counsel state that the court acted in giving them. The brief un-
doubtedly discloses the 10 of this court. All that needs to be

set in a case of this character would certainly have been included
in a long brief, and even a trial would have been of some
assistance to this court. Numerous complaints are made as to the

writing of the court and as to the conduct of plaintiff's counsel
during the trial. It would surely be curious to discuss them.
While there is some in some of the conclusions made by the de-
fendants, yet the issue in the case is simple and we are certain

that the jury was not misled by any error that might have been committed by court or counsel.

The judgment of the Municipal court of Chicago is reversed and judgment entered in this court in favor of the plaintiff against the defendants for \$163.76. The defendants will be required to pay 75 per cent of the costs of this court and plaintiff the remaining 25 per cent.

JUDGMENT REVERSED AND JUDGMENT ENTERED HERE.

Matchett, P. J., and McSurely, J., concur.

441 St. Louis, Mo. 63101-4201

will be replaced by the following:

175 - 32116

CYRIL C. MAISON,
Appellee,

vs.

FEDERAL PARLOR FURNITURE CO.,
Appellant.

15522
2-2-34
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 19, 1926, plaintiff instituted a suit in the Municipal court of Chicago against the defendant to recover \$400 claimed to be due him for services performed in reducing defendant's electric light and power bills in accordance with a written agreement entered into between the parties.

The defendant filed an affidavit of merits in which it set up that plaintiff had obtained for it no refunds or reduction in the cost of its electric light and power bills. On July 18, 1927, the case went to trial and on motion of the plaintiff an order was entered giving him leave to increase the amount for which he was suing to \$700. The record then recites that the case came on for hearing before the court without a jury and after the evidence was heard ^{and} the arguments of counsel the court found in favor of the plaintiff and against the defendant and assessed the damages at \$509.85, and it is to reverse this judgment that the defendant appeals.

Plaintiff offered evidence tending to show that on April 15, 1926, the parties entered into a written agreement, whereby plaintiff was to use his best efforts to reduce the cost of the defendant's electric light and power bills, and in consideration the defendant agreed to pay plaintiff fifty per cent of any saving for the first three years and further agreed to pay fifty per cent of the amount of any refunds that might be obtained through plaintiff's efforts. The evidence further shows that on the same day the defend-

848 A. 643

THURSDAY MORNING COURT

OF CHICAGO.

CHAS. G. BARNES,
Appellee,

vs.

THE CHICAGO ELECTRIC LIGHT & POWER COMPANY,
Appellant.

MR. JUSTICE O'BRIEN DELIVERED THE OPINION OF THE COURT.

July 19, 1938, plaintiff instituted a suit in the

Superior Court of Chicago against the defendant to recover

damages for the loss of his car services rendered in reducing

plaintiff's electric light and power bills in accordance with a

written agreement entered into between the parties.

The defendant filed an affidavit of merits in which

it set up that plaintiff had obtained for it no refunds or reduc-

tions in the cost of its electric light and power bills. On July

18, 1937, the case went to trial and on motion of the plaintiff

an order was entered giving him leave to increase the amount for

which he was suing to \$700. The record then recites that the

case came on for hearing before the court without a jury and after

the evidence was heard, the arguments of counsel the court found in

favor of the plaintiff and against the defendant and assessed the

damages at \$200.35, and it is to reverse this judgment that the de-

fendant appeals.

Plaintiff offered evidence tending to show that on

April 18, 1938, the parties entered into a written agreement, whereby

plaintiff was to use his best efforts to reduce the cost of the de-

fendant's electric light and power bills, and in consideration the

defendant agreed to pay plaintiff fifty per cent of any saving for

the first three years and further agreed to pay fifty per cent of

the amount of any refunds that might be obtained through plaintiff's

efforts. The evidence further shows that on the same day the defend-

ant gave plaintiff a letter addressed to the Commonwealth Edison Company, requesting it to permit plaintiff to examine its account and to show him any statements in reference to the matter. Upon receipt of this the plaintiff went to see the Commonwealth Edison Company and took the matter of reducing the defendant's light and power bills up with that company. On April 22nd the plaintiff gave to the defendant two forms of contracts which he had obtained from the Commonwealth Edison Company and which he requested defendant to sign. These contracts apparently would have given the defendant a lower rate for its electric light and power. The evidence further shows that plaintiff called on the defendant and the Edison Company a number of times, inquiring of the Edison Company whether defendant had signed the contracts, and was advised by it that the defendant had not done so. Later a contract was entered into between the Edison Company and the defendant, whereby the latter was given a lower rate for its electric light and power. The evidence further tends to show that the defendant was put on the lower rate sometime in September, 1925, and that the amount it had saved on account of the lower rate from September, 1925, until the date of the trial, July 18, 1927, was \$1056.17, less certain costs for lamps which the defendant was required to install in its plant at its own expense.

Defendant offered evidence tending to show that it obtained the lower rate through its own negotiations with the Edison Company. A representative of the Edison Company testified that he had charge of the rate-making department of his company and that prior to April 15, 1925, he had written two letters to the defendant concerning a lower rate which the defendant might obtain, one of which letters was written March 26, 1925, and the other April 7, 1925. These letters are in the record and they go to show that the Edison Company and the defendant were negotiating in reference to a lower rate for electric light and power before plaintiff came

and gave plaintiff a letter addressed to the Commonwealth Edison Company, requesting it to permit plaintiff to examine its account and to show him any statements in reference to the matter. Upon receipt of this the plaintiff went to see the Commonwealth Edison Company and took the matter of reducing the defendant's light and power bill up with that company. On April 12th the plaintiff gave to the defendant two forms of contracts which he had obtained from the Commonwealth Edison Company and which he requested defendant to sign. These contracts apparently would have given the defendant a lower rate for its electric light and power. The evidence further shows that plaintiff called on the defendant and the Edison Company a number of times, including at the Edison Company where defendant had signed the contracts, and was advised by it that the defendant had not done so. Later a contract was entered into between the Edison Company and the defendant, whereby the latter was given a lower rate for its electric light and power. The evidence further tends to show that the defendant was put on the lower rate sometime in November, 1925, and that the amount it had saved on account of the lower rate from September, 1925, until the date of the contract, July 13, 1927, was \$2084.17, less certain costs for lamps which the defendant was required to install in its plant at its own expense. Defendant offered evidence tending to show that it obtained the lower rate through its own negotiations with the Edison Company. A representative of the Edison Company testified that he had charge of the rate-making department of his company and that prior to April 12, 1925, he had written two letters to the defendant recommending a lower rate which the defendant might obtain, one of which letters was written March 28, 1925, and the other April 7, 1925. These letters are in the record and they go to show that the Edison Company and the defendant were negotiating in reference to a lower rate for electric light and power before plaintiff came

into the case and that the defendant had hesitated to sign the contract for the lower rate because it was of the opinion that it would not result in any saving to it for the reason that under the proposed contract the defendant would have to furnish its own lamps, while under the contract theretofore existing between it and the Edison Company the latter would furnish the lamps.

From the foregoing it clearly appears that there is a conflict in the evidence as to whether plaintiff's efforts resulted in a saving to the defendant. The court found in favor of the plaintiff, and upon a careful consideration of all the evidence in the record, we think we would not be warranted in disturbing the finding. But the judgment must be reversed because of an error of law. When plaintiff offered evidence to prove the amount that the defendant had saved on its light and power bills, the defendant objected, stating that no proof on this question was proper except that which tended to show a saving up to the time the suit was brought. The court over-ruled this objection and permitted the plaintiff to prove the amount of the saving up to the time of the trial, which was a year after the suit was begun. Plaintiff argues that this ruling was correct, but no authority is cited nor is any comment made on the cases cited by the defendant on this point. Upon an examination of the authorities we are of the opinion that no evidence should have been admitted tending to show the saving after the suit was brought. Hamlin, Hall & Co. v. Race, 78 Ill. 423; Collins v. Motemy, 3 Ill. App. 182; Kahn v. Cook, 22 Ill. App. 559; Taylor v. Richman, 87 Ill. App. 419; Staples v. Cassman, Appellate Court, First District, No. 31016 (not reported.) In these cases it is held that where a suit is brought upon a contract the plaintiff can recover only the amount due at the time the suit is begun, although at the time of the trial other installments may be due.

A further complaint is made that the amount of the judgment is greater than the amount for which plaintiff sued. Any error in this respect may be obviated because the judgment must be reversed for the error above indicated.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and McSurely, J., concur.

The first thing I noticed when I stepped
 out of the car was the smell of the
 sea. It was a strange, salty
 smell that I had never before.
 I had heard that the sea was
 beautiful, but I had never
 experienced it. I was
 standing on the beach, looking
 out at the water. It was
 so blue, so clear. I had
 never seen anything like it
 before. I was in luck.

The first thing I noticed when I stepped
 out of the car was the smell of the
 sea. It was a strange, salty
 smell that I had never before.

184 - 32125

CITY OF CHICAGO,
Defendant in Error,

vs.

EMIL PEARSON,
Plaintiff in Error.

24 643
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Emil Pearson was found guilty, by the court, of violating Sec. 2655 of the ordinances of Chicago, a fine of \$50 was assessed against him, and he prosecutes this writ of error.

By leave of court a complaint charging the defendant with disorderly conduct was filed in the Municipal court of Chicago on June 16, 1927. The specific offense charged was that the defendant "did make, aid, countenance and assist in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2655 of the Chicago Municipal Code of 1922." On June 22nd the defendant was arrested under the warrant. The case was set for trial on June 30, 1927, and on the latter date it was continued to July 12, 1927, when a jury was waived and the cause heard. The evidence is not preserved in the record.

The defendant contends that the court erred in denying his motion for a bill of particulars and that the complaint did not state a cause of action. We have above quoted the specific charge made in the complaint and think it was of such a general character that the court should have required the City to file a bill of particulars, specifying the charges made against the defendant; but there is no showing that the defendant was in any way injured by the ruling of the court and in such case the judgment will not be disturbed. People v. Munday, 260 Ill. 32; People v. Gray, 250 Ill.

2481A.642

REPORT TO MUNICIPAL COURT

ON CHICAGO

Violating in Error

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Paul Pearson was found guilty, by the court, of

violating Sec. 2665 of the ordinances of Chicago, a fine of

\$10 was assessed against him, and he pronounced this will of

By leave of court a complaint was filed in the Municipal Court of

with disorderly conduct was filed in the Municipal Court of

Chicago on June 16, 1937. The specific offense charged was that

the defendant "did make, aid, countenance and assist in making

an improper noise, disturbance, breach of the peace and diversion

leading to a breach of the peace in violation of Section 2665 of

the Chicago Municipal Code of 1935." On June 22nd the defendant

was arrested under the warrant. The case was set for trial on

June 30, 1937, and on the latter date it was continued to July 12,

1937, when a jury was waived and the cause heard. The evidence in

not preserved in the record.

The defendant contends that the court erred in denying

him his motion for a bill of particulars and that the complaint

did not state a cause of action. We have above quoted the specific

charge made in the complaint and think it was of such a general

character that the defendant was fully apprised of the nature of the

charge against him. The defendant further contends that the complaint

did not state a cause of action. We have above quoted the specific

charge made in the complaint and think it was of such a general

character that the defendant was fully apprised of the nature of the

431; People v. Boykin, 298 Ill. 11. In the Kunday case, where the motion of the defendant for a more specific bill of particulars was denied, it was held that whether the state should be required to furnish a bill of particulars in a particular case was a matter for the sound legal discretion of the court, and that where it was clear that the discretion had been abused, the denial of the motion was error. The court there also held that since it did not appear that the defendant was injured by reason of the failure of the People to file a more specific bill of particulars, there was no error of which the defendant might complain. To the same effect are the other cases cited.

In the instant case there is no showing that the defendant was in any way prejudiced by the refusal of the court to award him a bill of particulars. In these circumstances the defendant cannot be heard to complain.

The defendant contends that the complaint does not state a cause of action. No authority is cited in support of such contention, and we think it is without merit. The complaint charged the defendant with the violation of Section 2655 of the Municipal Code and specified the particular violations complained of, and while the charge was general in its terms, we think it was sufficient. City of Chicago v. Baranov, 199 Ill. App. 25; City of Chicago v. Williams, 254 Ill. 363.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

motion of the defendant for a more specific bill of particulars was denied, it was held that whether the state should be required to furnish a bill of particulars in a particular case was a matter for the sound legal discretion of the court, and that where it was found that the discretion had been abused, the denial of the motion was error. The court there also held that since it did not appear that the defendant was injured by reason of the failure of the People to file a more specific bill of particulars, there was no error of which the defendant might complain. To the same effect was the other case cited.

In the instant case there is no showing that the defendant was in any way prejudiced by the refusal of the court to award him a bill of particulars. In these circumstances the defendant cannot be heard to complain.

The defendant contends that the complaining law firm made a case of action. He authority is cited in support of such contention, and we think it is without merit. The complaining charges the defendant with the violation of Section 202B of the Criminal Code and specified the particular violations complained of, and while the charge was general in its terms, we think it was sufficient to enable the defendant to prepare his defense. The judgment of the Municipal Court of Chicago is affirmed.

APPROVED.

WILLIAM F. LEE, J., Clerk.

270 - 32211

6504a
248 L.A. 643^u
SYLVIA R. GERTSON, Formerly
SYLVIA R. MATHES,
Appellee,

vs.

SAM A. MATHES,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order of the Circuit court of Cook county, which permitted the complainant, the mother of two children, to take them with her to New York, where she lived, for a month's vacation during the summer time.

The record discloses that on August 28, 1925, the complainant obtained a decree of divorce from the defendant, entered by the Circuit court of Cook county, the basis of it being that the defendant had been guilty of extreme and repeated cruelty toward the complainant. There were two children born to the parties, who at the time were residing with their father, the defendant. One was thirteen and the other seven years of age. The court found that the children were living with their father; that he had been kind to them and was able to take care of and support them, and their custody was given to him with the provision that the complainant should have the right and permission to see them at all times upon giving notice.

Since the divorce both parties have remarried, complainant living with her husband in New York city and the defendant residing with his wife in Chicago. Prior to the entry of the order in question, it being made to appear that the defendant was interfering with complainant's right to visit the children, other orders were entered on motion or petition of the complainant, permitting her to visit and to have charge of the two boys for a short time.

afterwards complainant filed her petition which was the basis for

2481.A.643

OFFICE OF THE CLERK OF THE COURT

OF COOK COUNTY.

SHIRLEY A. BARNES, formerly
SHIRLEY A. BARNES, formerly

vs.

WILLIAM A. BARNES,

Defendant.

MR. JUSTICE: I HEREBY CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT COPY OF THE RECORDS OF THE COURT IN THE ABOVE ENTITLED CASE.

By this report the defendant seeks to reverse an order of the Circuit Court of Cook County, which granted the custody of the children of the children, to take them with her to New York, where she lived, for a month's vacation during the summer time. The record discloses that on August 24, 1932, the defendant obtained a decree of divorce from the defendant, entered by the Circuit Court of Cook County, and that at the time of the divorce the defendant was residing with her father, and the children were living with their father; that he had been kind to them and was able to take care of and support them, and that custody was given to him with the provision that the complainant should have the right and permission to see them at all times upon request.

Since the divorce both parties have remarried, and the defendant is now living with her husband in New York City and the defendant is living with him in Chicago. Prior to the entry of the order of the Circuit Court of Cook County, the defendant was living with her father, and the children were living with their father; that he had been kind to them and was able to take care of and support them, and that custody was given to him with the provision that the complainant should have the right and permission to see them at all times upon request.

It is the duty of the Court to protect the best interests of the children, and in this case the Court finds that the defendant is not fit to have the custody of the children, and that the children should be placed with their father, who is a fit and proper person to have the custody of the children.

Officially certified and filed for the father who was the plaintiff.

the order in question, in which, among other things, it was averred that the defendant had alienated the affections of the children from the mother and had withheld from them presents which she had sent to them; that she was desirous of having the children for a month during the summer vacation, and the prayer was that an order be entered granting her the right to take care of the children for a month during the summer vacation. The defendant answered the petition, averring that the complainant and her present husband were not fit or proper persons to have the custody of the children; there were allegations that the complainant, prior to her divorce from the defendant, had been guilty of improper conduct. Evidence was heard before the chancellor on behalf of both parties; the court found that the complainant was a fit and proper person to have the care, custody and control of the children and it was ordered that she be given such control for a period of one month during the summer vacation; it was further ordered that complainant advise defendant at least once a week during such period as to the whereabouts of the children, she having been given the privilege to take them to her home in New York city.

A great many points are made by the defendant as to why the order should be reversed and numerous authorities are cited. The question at issue is a simple one. The court had authority, under section 18 of chapter 40, Cahill's Statutes, to enter the order in question. The order was but a temporary one and did not have the effect of taking the custody of the children from the father and giving them to the mother, which seems to be the position argued by the defendant. We think the evidence was sufficient to warrant the chancellor in awarding complainant the custody of the children for a month during the vacation period. It is certain that we would be wholly unwarranted in holding that the finding was against the manifest weight of the evidence.

the order in question, in which, among other things, it was ordered that the defendant had alienated the affections of the children from the mother and had withheld from them presents which she had sent to them; that she was desirous of having the children for a month during the summer vacation, and the prayer was that an order be made awarding her the right to take care of the children for a month during the summer vacation. The defendant answered the petition, averring that the complainant and her present husband were not fit or proper persons to have the custody of the children; there were allegations that the complainant, prior to her divorce from the defendant, had been guilty of improper conduct. Evidence was heard before the chancellor on behalf of both parties; the court found that the complainant was a fit and proper person to have the care, custody and control of the children and it was ordered that she be given such control for a period of one month during the summer vacation; it was further ordered that complainant advise defendant at least once a week during such period as to the whereabouts of the children, she having been given the privilege to take them to her home in New York city.

A great many points were made by the defendant as to why the order should be reversed and numerous authorities were cited. The question at issue is a simple one. The court had authority under section 18 of chapter 40, Civil Practice Statutes, to enter the order in question. The order was not a temporary one and did not have the effect of taking the custody of the children from the defendant. We think the evidence was sufficient to sustain the order by the defendant. We think the chancellor in awarding complainant the custody of the children for a month during the vacation period. It is certain that the weight of the evidence

The complainant assigns cross-errors which question the ruling of the chancellor in sustaining the defendant's demurrer to her petition for solicitor's fees. The allegations of the petition do not appear in the abstract; it is not abstracted at all, and so far as we are able to find there was no prayer of appeal from the order sustaining the demurrer. The record is entirely wanting in this respect to present any such question.

The order of the Circuit court of Cook county awarding the custody of the children to the complainant for a month is affirmed.

AFFIRMED.

Matchett, P. J., and McCurely, J., concur.

The complaint contains nothing which goes to
the truth of the charges in maintaining the defendant's de-
mand for her position for defendant's loss. The allegations of
the petition do not appear in the abstract; it is not reflected
at all, and as far as we are able to find there was no power of
appeal from the order sustaining the demand. The record is
entirely wanting in this respect to present any such question.
The order of the Circuit Court of Cook County
The custody of the children to the complainant for a

VERIFIED

JOSEPH B. DEIBLER,
Appellee,

vs.

W. C. HANINNEY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$420 which he claimed the defendant had collected but failed to turn over to him. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for the amount of his claim and the defendant prosecutes this appeal.

Beginning with plaintiff's statement of claim and continuing throughout, the record is confused and almost unintelligible, and the facts have not been made much clearer in the briefs filed. Neither counsel has followed Rule 19 of this court in the preparation of the briefs. But upon an examination of all the record we think the following facts appear: That on May 1, 1922, the defendant entered into a written contract with the Milk Hauling and Contracting Co., which it is said was an Illinois corporation. The agreement states that the defendant on March 31, 1922, had entered into a contract with Sidney Wanzer & Sons, Inc., covering a period of five years, whereby the defendant agreed to do certain hauling for that concern for \$100,000, payments to be made by the Wanzer Company to him in semi-monthly installments. The contract further recited that in consideration of the Milk Hauling Company purchasing from the Indiana Truck Corporation of Illinois certain personal property, the defendant assigned his interest in the contract to the Milk Hauling Company. It further appears that the Milk Hauling Company had two trucks which it used in its business and on which plaintiff had

2481.A.648

200 - 10000

APPEAL FROM HONORABLE COURT

CHICAGO.

FILED
APPEAL

W. H. MARSHALL
Appellant

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover

over \$400 which he claimed the defendant had collected but

failed to turn over to him. There was a trial before the court

and the jury found in favor of the plaintiff and awarded him

the sum of \$400 with interest and costs.

Verdict.

Beginning with plaintiff's statement of claim and then

finding throughout, the record is confused and almost unintelligible.

and the facts have not been made much clearer in the briefs filed.

Neither counsel has followed Rule 10 of this court in the preparation

of the briefs. But upon an examination of all the record we think

the following facts appear: That on May 1, 1932, the defendant entered

into a written contract with the Milk Handling and Contracting

Co., which it is said was an Illinois corporation. The agreement

stated that the defendant on March 21, 1932, had entered into a

contract with Sidney Warner & Sons, Inc., covering a period of five

years, whereby the defendant agreed to do certain hauling for that

company for \$100,000, payments to be made by the Warner Company to

the defendant monthly installments. The contract further recited that

in consideration of the Milk Handling Company purchasing from the

Illinois Truck Corporation of Illinois certain personal property, the

defendant assigned his interest in the contract to the Milk Handling

Company. It further recites that the Milk Handling Company had two

trucks which it used in the business and on which plaintiff had

chattel mortgages securing an indebtedness which was overdue and plaintiff was threatening to foreclose the chattel mortgages.

It further appears that the Milk Hauling Company purchased the truck about May 1, 1922, from the Indiana Truck Corporation of Illinois, agreeing to pay therefor \$7243.62, none of which was paid at the time, but the Milk Hauling company executed its thirty-six notes due monthly as evidence of its indebtedness for the truck. On May 11, 1922, the plaintiff, defendant, and the Milk Hauling company set and two written documents were executed; one of these documents stated that the Milk Hauling company had on that date made an agreement with plaintiff, who had the chattel mortgages on the Milk Hauling Company's two trucks, whereby the Milk Hauling company was to be paid \$150 on the first and fifteenth of every month on account of the mortgages. This document was signed by the Milk Hauling company and addressed to the Indiana Truck Company. The other document was an agreement entered into between plaintiff and the Milk Hauling company. It provided that the Milk Hauling company was to pay plaintiff \$300 a month, \$150 being payable on the first and fifteenth of each month. The contract further provided that the two trucks were to be used for hauling the milk for the Wanzer Company. It further appears that afterwards the Indiana Truck Company collected from the Wanzer Company, under its assignment from the Milk Hauling company the money earned by the Milk Hauling Company in the hauling which it did for the Wanzer company, and out of this the Indiana Truck Company made three of the \$150 payments to the plaintiff, and that it applied part of the balance of the money to the payment of notes executed by the Milk Hauling company for the truck which it had purchased from the Indiana Truck company, and also applied part of the money to pay the men who did the hauling for the Wanzer company. On June 26, 1922, the Indiana Truck Company wrote a

letter to the plaintiff advising him that the Milk Hauling company had told the Indiana Truck company to make no further payments to the plaintiff, and further advising plaintiff that the Milk Hauling company was then under new management. No further payments were made to the plaintiff.

Plaintiff's suit is based on the theory that the defendant personally collected money from the Wanzer company and refused to turn it over to plaintiff. But there is no evidence in the record that the defendant ever obtained any money from the Wanzer company; on the contrary, all the evidence is to the effect that the money was paid by the Wanzer company to the Indiana Truck company.

The judgment is wholly unsupported by the evidence and must therefore be reversed.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McGuire, J., concur.

...the plaintiff advising him that the Milk Handling company
had told the ... company to make no further payments to
the plaintiff, and further advising plaintiff that the Milk Handling
company was then under new management. No further payments were

made to the plaintiff.

...plaintiff's suit is based on the theory that the de-
fendant personally collected money from the Warner company and
refused to turn it over to plaintiff. But there is no evidence in
the record that the defendant ever obtained any money from the
Warner company on the contrary, all the evidence is to the
effect that the money was paid by the Warner company to the

plaintiff's company.

...The judgment is wholly unsupported by the evidence
and must therefore be reversed.

...The judgment of the Municipal Court of Chicago is
reversed and the cause remanded.

REVEREND AND HONORABLE

...and ...

FUSO MARINE AND FIRE INSURANCE
COMPANY, LTD., a Corporation of
Tokio, Japan,

Appellee,

vs.

R. E. CRAWFORD, Trading as R. E.
CRAWFORD & COMPANY,

Appellant.

248 I.A. 644

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover money claimed to be due and owing from defendant in the sum of \$2945.54. To the statement of claim the defendant filed an affidavit of merits, which was stricken, and by leave of court he filed an amended affidavit of merits, which also appears to have been stricken; and counsel for the defendant say that the defendant was thereupon defaulted and that a jury was impanelled to assess the damages. This statement will be hereinafter referred to. The jury returned a verdict in favor of the plaintiff and against the defendant for \$2617.74, judgment was entered on the verdict and the defendant appeals.

Plaintiff in its statement of claim alleged that its claim is "for moneys due and owing from the defendant amounting to \$3068.42," then follow an item of interest and an item of credit, which last item it is alleged was credited on the January account between the parties, making a balance due from the defendant to the plaintiff of \$2945.54. There is a further allegation that the amount claimed is for collections made by the defendant as shown in an exhibit attached to and made a part of the statement of claim.

The defendant filed an affidavit of merits which the record discloses was, by agreement of the parties, stricken. Leave was given to the defendant to file an amended affidavit of

2481A.644

AMERICAN FOREIGN MINISTRIAL COURT

MAKIN AND TION
COMPANY, LTD., a Corporation of
Tokio, Japan.

MAKIN AND TION
COMPANY, LTD., a Corporation of
Tokio, Japan.

MR. JUSTICE OF THE PEACE
In the matter of the
defendant's appeal against the decision of the
court of first instance in the
sum of \$2000.00. In the statement of claim the defendant filed
an affidavit of service, which was attested, and by leave of court
he filed an amended affidavit of service, which was also attested to
have been served; and counsel for the defendant say that the
statement was foregone and that a jury was impaneled
to hear the cause. This statement will be received for
evidence. The jury returned a verdict in favor of the plaintiff
and against the defendant for \$2007.75, judgment was entered on the
verdict and the defendant appeals.

Plaintiff in its statement of claim alleged that the
defendant is "for services due and owing from the defendant amounting
to \$2000.00" and that the defendant has failed to pay the same.
The defendant in its statement of claim alleged that the
defendant is "for services due and owing from the defendant amounting
to \$2000.00" and that the defendant has failed to pay the same.
The defendant in its statement of claim alleged that the
defendant is "for services due and owing from the defendant amounting
to \$2000.00" and that the defendant has failed to pay the same.

The defendant filed an affidavit of service which
the court received and, by agreement of the parties, set aside.
The court has also received the statement of claim of the defendant.

merits, which was accordingly done. The amended affidavit of merits is made by the defendant and sets up that he has a good defense upon the merits to the whole of plaintiff's claim; then follows this paragraph: "This defendant denies each and every allegation in the plaintiff's statement of claim except such as are hereinafter expressly admitted." The defendant then denies that he owes "\$3068.42 and interest in the amount of \$51.14 as set forth in the plaintiff's statement of claim," and further denies "making collections which are due to the plaintiff as shown by Exhibit 'A' attached to the plaintiff's statement of claim," or "that he is holding collections due to the plaintiff as claimed." He then admits "that in the future some money may become due from this defendant to the plaintiff," but that he owes plaintiff no money at this time. He further sets up that "there may become due to the plaintiff the sum of \$2107.24 for premiums upon said policies but that the said premiums have not been earned up to this date and will not have been earned until the said 16th day of August, 1929, and that no money of any kind is due to the plaintiff at this time, and in the event of loss or cancellation no money may ever be owing to the said plaintiff." The affidavit of merits further sets up that plaintiff is a foreign corporation not qualified to do business in Illinois and therefore not entitled to sue in the courts of this state; that plaintiff had done business in Illinois; that it had been licensed by this state, but had withdrawn therefrom and had ceased to do business in this state; that it had issued insurance policies for which it claims premiums and that this defendant was its agent in issuing and delivering some of said policies of insurance; that the defendant and his clients (to whom policies had been issued) were "without protection in view of the withdrawal of the said plaintiff from the state of Illinois, and that no moneys may ever become due or owing to the said plaintiff for this reason, and that in any event there are no

[illegible]

moneys due to the said plaintiff from this defendant at this time." This affidavit was filed November 30, 1926. On January 6, 1927, an order was entered on motion of the plaintiff striking the affidavit from the files, and stating that the defendant was given ten days to file a second amended affidavit of merits. The order then states that defendant was given leave to file an interlocutory bill of exceptions to the order striking his affidavit of merits from the files, and that the defendant is defaulted for want of an affidavit of merits. In the next paragraph of the order the default is set aside.

The next that appears in the record is what is designated as an interlocutory bill of exceptions, which recites that on January 6, 1927, the cause came on for hearing in due course on the jury calendar; that plaintiff then moved to strike defendant's amended affidavit of merits on the ground that it was insufficient as a matter of law; that after argument of counsel the court struck the amended affidavit of merits and defendant excepted. A further recitation is that the court then gave defendant 5 days to amend its affidavit of merits, but that the defendant elected to stand by its amended affidavit of merits; that thereupon the court defaulted defendant for want of an affidavit of merits and then vacated the default. Then followed the ordinary certificate of the trial Judge to the bill of exceptions. The stricken affidavit of merits does not appear in the bill of exceptions, but a bill of exceptions was unnecessary because the order states it was stricken because it was insufficient as a matter of law, i. e., that it set up no legal defense. The motion to strike was equivalent to a demurrer and the point was saved, as appears from the common law record.

The record next discloses that on February 8, 1927, an order was entered which recites that the cause came on for trial in the regular course before a jury who were "duly elected, tried and sworn to well and truly try the issues herein and a true verdict render." After hearing the evidence and the arguments of

money due to the said plaintiff from this defendant at this time. This affidavit was filed November 20, 1937. On January 6, 1937, an order was entered on motion of the plaintiff requiring the defendant to appear on the trial date, and stating that the defendant was given ten days to file a second amended affidavit of merits. The order then stated that the defendant was given leave to file an interrogatory bill of exceptions to the order striking his affidavit of merits from the files, and that the defendant is detained for want of an affidavit of merits. In the next paragraph of the order the defendant is not under.

The next that appears in the record is what is designated

as an interrogatory bill of exceptions, which recites that on January 6, 1937, the cause came on for hearing in due course on the jury calendar; that plaintiff then moved to strike defendant's amended affidavit of merits on the ground that it was insufficient as a matter of law; that after hearing the court granted the motion and entered an order striking the same and defendant excepted. A further recitation is that the court then gave defendant 5 days to amend the affidavit of merits, but that the defendant elected to stand by the amended affidavit of merits; that thereupon the court detained defendant for want of an affidavit of merits and then vacated the order. Then followed the entry of a bill of exceptions to the trial judge in the bill of exceptions.

At a bill of exceptions was not necessary because the order stated it was sufficient because it was insufficient as a matter of law, i. e., that it set up no legal defense. The motion to strike was denied and a bill of exceptions was entered, as appears from the common law.

The record next discloses that on February 5, 1937, a bill of exceptions was entered which recites that the cause came on for trial on the jury calendar; that the court granted the motion to strike the same and entered an order striking the same and defendant excepted. A further recitation is that the court then gave defendant 5 days to amend the affidavit of merits, but that the defendant elected to stand by the amended affidavit of merits; that thereupon the court detained defendant for want of an affidavit of merits and then vacated the order. Then followed the entry of a bill of exceptions to the trial judge in the bill of exceptions.

counsel the jury retired and returned their verdict into open court, finding the issues against the defendant and assessing the plaintiff's damages at \$2617.74.

On February 26th following defendant's motion for a new trial was over-ruled, judgment was entered on the verdict and defendant appealed. The appeal was allowed upon the filing of a bond and a bill of exceptions. In the record appear the bond and bill of exceptions, showing the evidence heard by the jury, which consisted of depositions taken on behalf of the plaintiff.

The defendant, by his counsel, at the commencement of the trial stated that he was in default but that he was entitled to have a jury to assess the damages; but the record discloses that he objected to questions put to witnesses just as though he had not been defaulted, and it appears that counsel took part in the trial but produced no witnesses.

The evidence offered on behalf of the plaintiff shows that the defendant was plaintiff's Chicago agent; that there were monthly accountings between them, as shown by monthly statements passing between the parties. From plaintiff's books it appears that defendant was indebted to plaintiff in the sum of \$2171.51. A witness testified on behalf of plaintiff that plaintiff had received statements from the defendant which showed that the defendant owed the plaintiff \$2171.33. Plaintiff also claimed interest of \$446.23. The evidence tended to show that monthly statements were issued by defendant showing the amounts he had collected and the amounts he had retained, and that the interest items are computed on the amounts as shown each month.

A reading of the entire record discloses that defendant had no defense. His only claim as disclosed by his affidavit of merits appears to be that some of the policies which he had obtained and for which he had received the premiums, might at

The evidence offered on behalf of the plaintiff shows that the defendant was guilty of the crime charged; that there were monthly accountings between them, as shown by monthly statements passing between the parties. From plaintiff's books it appears that defendant was indebted to plaintiff in the sum of \$217.81. A witness testified on behalf of plaintiff that plaintiff had no other accounts from the defendant which showed that the defendant owed him the plaintiff \$217.81. Plaintiff also of hand interest at death. The evidence further shows that the defendant was guilty of the crime charged. The evidence further shows that the defendant was guilty of the crime charged.

some future time be cancelled and therefore some of the premiums might have to be returned to the holders of the policies. If this should occur, the claim of the policy holder would be against the plaintiff, not against the defendant, who was merely the plaintiff's agent.

The defendant contends that the judgment is wrong and should be reversed because plaintiff's statement of claim does not state a cause of action, and in support of this defendant cites cases where the defendant was defaulted and in which cases no evidence was heard. It is obvious that such cases are inapt because in the instant case, even if we consider in the confused state of the record, that the defendant was defaulted, yet it appears that evidence was introduced and the case heard and decided upon the evidence. In the state of the record there was no occasion for the plaintiff offering any evidence because the case was one of assumpsit, which set forth specifically the amount of plaintiff's claim and this was verified. Defendant's amended affidavit of merits having been stricken, judgment might have been entered upon plaintiff's statement of claim without any evidence. But we think the statement of claim was sufficient. It set up in substance that plaintiff's claim is for money due and owing from the defendant for collections made. This may be considered sufficient as a common count for money had and received. Moreover, although this is a case of the first class in the Municipal court, pleadings in such class of cases are now the same as pleadings in cases of the fourth class. New Columbus B. Co. v. Empire B.B.V.Co., 196 Ill. App. 421.

And since the record discloses that the jury were sworn not to assess the damages but to try the issues and that they did so, and the evidence was heard, and since it also appears on the whole record that the defendant has no defense, the judgment ought not to be disturbed for any slight error in the record. Lyons v. Kanter, 285 Ill.

336. In that case the court said that although the plaintiff's statement of claim was insufficient, yet the trial of the case was on the theory that it was sufficient and the court therefore would not reverse the judgment. The court there said (p. 339): "The issue (which was omitted from plaintiff's statement of claim) was introduced by the defendants instead of the plaintiff, but we will not, with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial." We are clearly of the opinion that the amended affidavit of merits was insufficient and that it was properly stricken. A reading of it, the material allegations of which we have above set forth, shows that there was no defense, but that on the contrary it substantially admits that the defendant owed \$2107.28 for premiums which he has collected and not turned over to plaintiff, the only defense being that at some uncertain time in the future policies might be cancelled which would require a return to the policy holders of a part of the premiums thus collected. Nor is there any merit in that part of the affidavit which seeks to set up as a defense the statute of this state in reference to foreign corporations. That paragraph shows that the plaintiff was at one time qualified to do business in this state and presumably it was qualified when the policies in question were issued. It later withdrew, the affidavit of merits states, but this would not prevent it from afterwards bringing suit in our courts.

Complaint is made as to the allowance of interest, but we think that since the evidence discloses that there was a certain amount due from the defendant to the plaintiff at the end of each month, which money was not turned over by the defendant, there was vexatious delay and the interest was properly allowed. The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

[illegible]

MAZEPPA SCOTT EDMUNDS, LEE SCOTT,
LUCY MOSELY, CLILIE ELDREDGE and
BERTIE ELDREDGE CARROLL.

MAZEPPA SCOTT EDMUNDS,
Appellant,

vs.

WALTER M. FARMER,
Appellee.

243 I.A. 344²

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against the defendant to recover \$931.67, claimed to be due on account of excessive attorney's fees charged and money received but not properly accounted for. There was a trial before the court without a jury and a finding in defendant's favor and this appeal followed.

It appears that Mattie Halvorsen, a sister of plaintiffs, died intestate in Chicago and at that time two of the plaintiffs came from their home in Virginia and employed the defendant, a practicing lawyer, to do what was necessary in and about probating the estate of the deceased.

Plaintiffs offered evidence to the effect that after he had made some investigation as to what service would probably be required of him, defendant agreed to perform such services for ten per cent of the amount of the estate of the deceased. On the other hand, evidence was offered by the defendant that it was agreed that his charge would be twenty-five per cent and not ten per cent. The defendant also offered evidence as to the services rendered by him, and toward the close of the trial the question under consideration was whether the defendant had charged more than a reasonable fee for the services performed. The court stated that he thought the fee was rather high, but that in view of all the evidence he should find the issues for the defendant. In plain-

2481A. 644

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

Local 100.

WILLIAM H. WATKINS,

THE JUDICIAL COUNCIL OF THE COUNTY OF COOK, ILLINOIS, presents an action against the defendant, to
warrant for the return of a writ of habeas corpus, claiming to be the owner of the property of the
defendant, and money received but not properly accounted for. There was a trial before the court without a jury
and a finding in defendant's favor and this appeal followed.
It appears that Eddie Halvorsen, a sister of plaintiff,
had interests in Chicago and at some time two of the
plaintiffs came from their home in Virginia and employed the
defendant, a traveling salesman, to do what was necessary in and
about the estate of the deceased.
The defendant offered evidence to the effect that after
he had been employed by the deceased, he had received from
the deceased a sum of money, which he had then paid to the
plaintiffs, and that he had then received from the plaintiffs
a sum of money, which he had then paid to the deceased.
The defendant also offered evidence to the effect that he
had received from the deceased a sum of money, which he
had then paid to the plaintiffs, and that he had then
received from the plaintiffs a sum of money, which he
had then paid to the deceased.
The defendant also offered evidence to the effect that he
had received from the deceased a sum of money, which he
had then paid to the plaintiffs, and that he had then
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had received from the deceased a sum of money, which he
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had then paid to the deceased.
The defendant also offered evidence to the effect that he
had received from the deceased a sum of money, which he
had then paid to the plaintiffs, and that he had then
received from the plaintiffs a sum of money, which he
had then paid to the deceased.

tiffs' statement of claim there were a number of items which they sought to recover, but, as just stated, the case was presented and decided only as to the reasonableness of the defendant's fee.

The evidence offered on behalf of the defendant shows that the services rendered by him were not the usual services in probating an estate. The evidence shows that in addition to the usual services in such case the defendant was required to look into the question of bonds signed by the deceased in her lifetime, one of which was executed in a matter pending in the Criminal court of Cook county; the evidence shows that the defendant settled the deceased's \$1,000 liability on this bond for \$400. The evidence further shows that there was a claim filed against the estate of \$1200 and that the defendant put in several days in the successful defense of this claim.

We have carefully considered all the evidence in the record and are of the opinion that we ought not to disturb the finding of the trial Judge.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

...of claim there were a number of items which they
sought to recover, but, as just stated, the case was presented and
decided only as to the reasonableness of the defendant's fee.
The evidence offered on behalf of the defendant

shows that the services rendered by him were not the usual
services in procuring an estate. The evidence shows that in
addition to the usual services in such case the defendant was
required to look into the question of bonds signed by the decedent
issued in New Orleans, one of which was executed in a matter
pending in the Criminal Court of Cook County; the evidence shows
that the defendant acted as decedent's attorney in this matter
this bond for \$400. The evidence further shows that there was a
claim filed against the estate of \$1200 and that the defendant
was in constant touch in the successful defense of this claim.

We have carefully considered all the evidence in the
case and we are of the opinion that the fee of \$1200 is
reasonable and proper.

Very truly yours,

WILLIAM H. HARRIS, Attorney at Law

THE UNION TRUST COMPANY, a
Corporation, administrator of the
Estate of WILLIAM GEORGE, Deceased,
Appellant,

vs.

THE CHICAGO, AURORA & ELGIN MOTOR
LINES, a Corporation,
Appellee.

243171 644
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Union Trust Company, a corporation, as administrator of the estate of William George, deceased, brought an action against the defendant to recover for the wrongful death of the deceased. At the close of the plaintiff's case there was a directed verdict for the defendant and this appeal followed. William George, the deceased, will be referred to as the plaintiff.

The evidence tends to show that at about six o'clock on the evening of December 4, 1924, plaintiff was walking south across VanBuren street at about the east cross-walk of Whipple street, when he was struck and killed by an eastbound motor truck owned and controlled by defendant. VanBuren street is an east and west street in Chicago; Whipple street is a north and south street which begins at the north side of VanBuren street and extends north. It does not extend south of VanBuren street. The evidence tends to show that it was raining at the time of the accident; that plaintiff was a married man about forty-six years of age, living with his wife and children; that it was dark at the time; the street lights were lit and there were stores and residences in the vicinity; it was a closely built up portion of the city. Counsel for plaintiff state in their brief that a witness testified there were "three high lights on the corner, 170 feet apart, and all were lighted at the time." of course this statement is meaningless because it gives us no idea where the lights were located, an important

THE UNION TRUST COMPANY,
 Corporation, Administrator of the
 Estate of WILLIAM GEORGE, Deceased,
 Plaintiff,

THE CHICAGO, ANCONA & ALTON MOTOR
 LINE, a Corporation,
 Defendant.

MR. JUSTICE O'BRIEN rendered the opinion of the court.

The Union Trust Company, a corporation, an administrator of the estate of William George, deceased, brought an action against the defendant to recover for the wrongful death of the plaintiff. As the case of the plaintiff's case there was a directed verdict for the defendant and this appeal followed. William George, the deceased, will be referred to as the plaintiff. The evidence tends to show that at about six o'clock

on the evening of December 4, 1934, plaintiff was walking south on Vanhook street at about the east crosswalk of Whipple street, when he was struck and killed by an eastbound motor truck owned and controlled by defendant. Vanhook street is an east and west street in Chicago; Whipple street is a north and south street which begins at the north side of Vanhook street and extends north. It does not extend south of Vanhook street. The evidence tends to show that it was raining at the time of the accident; that plaintiff was a married man about forty-six years of age, living with his wife and children; that it was dark at the time; the street lights were lit and there were signs and roadhouses in the vicinity; it was a closely built up portion of the city. Counsel for plaintiff state in their brief that a witness testified there were street high lights on the corner, 170 West street, and all were lit at the time. Of course this statement is meaningless because it gives us no idea where the lights were located, an important

element to be considered.

The evidence tends to show that just prior to the accident the truck was being driven east at a "high rate of speed" or "fast" as one witness put it; that the street was wet; that plaintiff was walking south across VanBuren street near the east crosswalk of Whipple street and was about the center of VanBuren street when the truck turned toward the northeast, and the driver, apparently in an endeavor to avoid striking plaintiff, tried to pass him on the north; that plaintiff stepped back, was struck, knocked down, run over and killed. Two witnesses gave testimony to the effect that they saw the truck coming from the west, heard it sound its horn, saw plaintiff walk south across the street, when he was struck and killed. In view of this evidence we are unable to agree with the contention of plaintiff's counsel that the court erred in refusing to permit a witness to testify as to the personal habits of the plaintiff. There being eye-witnesses to the accident, of course the testimony offered was clearly inadmissible, and the ruling of the trial court was correct.

Whether the plaintiff was guilty of negligence which approximately contributed to his death and whether the defendant was negligent in the operation of the truck, we think were questions of fact for the jury. As a general proposition, the questions of negligence and contributory negligence are questions of fact; but when all reasonable minds would reach the conclusion that plaintiff was guilty of negligence and defendant guilty of no negligence, or that both parties were guilty of negligence which proximately contributed to the accident, then the question becomes one of law for the court and a directed verdict is proper. Hally v. Chicago City Ry. Co., 235 Ill. 610. But upon a careful consideration of all the evidence in the record, we are of the opinion that the question of negligence on the part of the plaintiff and also on

element to be considered.

The witness wants to show that just prior to the

at least the truck was being driven east at a "high rate of speed"

or "fast" as the witness put it; that the street was wet; that

plaintiff was walking south across Vanhook street near the east

crosswalk of Whipple street and was about the center of Vanhook

street when the truck turned toward the northeast, and the driver

attempted to avoid striking plaintiff, tried to

pass him on the north; that plaintiff stopped back, was struck,

knocked down, run over and killed. Two witnesses gave testimony

to the effect that they saw the truck coming from the west, heard

it round the corner, saw plaintiff walk south across the street, when

he was struck and killed. In view of this evidence we are unable

to agree with the contention of plaintiff's counsel that the court

erred in refusing to permit a witness to testify as to the personal

habits of the plaintiff. There being no evidence to the contrary,

of course the testimony offered was clearly inadmissible, and the

trial of the trial court was correct.

Whether the plaintiff was guilty of negligence which

appreciably contributed to his death and whether the defendant

was negligent in the operation of the truck, we think were questions

of fact for the jury. As a general proposition, the question of

negligence and contributory negligence are questions of fact; but

when all reasonable minds would reach the conclusion that plaintiff

was guilty of negligence and defendant guilty of no negligence, or

that both parties were guilty of negligence which proximately con-

tributed to the accident, then the question becomes one of law

for the court and a directed verdict is proper. Kelly v. Chicago

and N.W. Ry., 233 Ill. 640. But upon a careful consideration of

all the evidence in the record, we are of the opinion that the

the part of the defendant should have been submitted to the jury.

Kessler v. Washburn, 157 Ill. App. 532. See also Libby, McNeil
& Libby v. Cook, 223 Ill. 206.

The judgment of the Circuit court of Cook county is
reversed and the cause remanded.

REVERSED AND REMANDED.

Witchett, C. J., and McDurely, J., concur.

1. The first of these is the fact that the
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2001-2002

FRANK S. OLIVERIO,
Appellee,

vs.

RALPH SOLLITT & SONS CONSTRUCTION
COMPANY, a Corporation, and JOHN
BERNHANN, INC., a Corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against Ralph Sollitt & Sons Construction Company, a corporation, to recover \$1,000 damages claimed to have been sustained by him by reason of the construction by defendant of a building immediately adjoining plaintiff's property. Afterwards John Bernhann, Inc., a corporation, was by leave of court made an additional party defendant. Each defendant filed an affidavit of merits to plaintiff's statement of claim. The case was tried before a jury and there was a verdict and judgment in plaintiff's favor for \$600 and defendants appeal.

The record discloses that plaintiff owned a two story brick residence in which he lived with his family; that the defendant John Bernhann, Inc., a corporation, owned a vacant lot immediately adjoining and in the fall of 1923 and spring of 1924 constructed a large four story business building on the vacant property, all of the mason, concrete and carpenter work being done by the defendant Ralph Sollitt & Sons Construction Co., a corporation. During the course of the construction plaintiff's shrubbery, fence, building, walks, etc., were damaged so that after the building was completed it was necessary to have the property restored. The defendant Ralph Sollitt & Sons Construction Co. made some slight repairs but refused to make others requested by plaintiff, whereupon plaintiff had the repairs made; it is to recover the cost of these that he sues.

2481.A.644

APPEAL FROM MUNICIPAL COURT

OF THE CITY

STATE OF NEW YORK
COUNTY OF ALBANY
JAMES H. KELLY, INC., a corporation,
Plaintiff,
vs.
ALBANY CONSTRUCTION COMPANY, a corporation,
Defendant.

THE COURT OF APPEALS, in and for the City and County of Albany, New York, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the said Court of Appeals.

Witness my hand and the seal of the said Court of Appeals, at Albany, New York, this 1st day of January, 1922.

ALBANY CONSTRUCTION COMPANY, a corporation, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the said Court of Appeals.

Witness my hand and the seal of the said Court of Appeals, at Albany, New York, this 1st day of January, 1922.

ALBANY CONSTRUCTION COMPANY, a corporation, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the said Court of Appeals.

Witness my hand and the seal of the said Court of Appeals, at Albany, New York, this 1st day of January, 1922.

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Witness my hand and the seal of the said Court of Appeals, at Albany, New York, this 1st day of January, 1922.

ALBANY CONSTRUCTION COMPANY, a corporation, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the said Court of Appeals.

Plaintiff offered evidence tending to show that the repairs he made were necessary because of the damage done by defendants in the construction of the adjoining building, while defendants offered some evidence to the effect that the damages were not as great as claimed by plaintiff.

Claus A. Erlandson, called on behalf of the defendants, testified that he was a general mason contractor and was employed by the defendant Ralph Sollitt & Sons Construction Company to superintend the masonry in the construction of the building in question; that he also superintended the carpenter and cement work; that at the beginning of the construction of the building he talked with plaintiff; that they were on friendly terms; that the Sollitt Company took down plaintiff's fence, which the witness testified was a foot over on the other property; that it was taken down with plaintiff's permission; that the posts were rotten and that plaintiff stated he would like to have the lumber in the old fence piled on plaintiff's property, which was done; that there were some few bushes and chrysanthemums in the back yard; that one of the concrete forms which was being used in the construction of the building fell on the chicken house and slightly wrecked it; that he did not know of any other damage his company did; that in pouring concrete some of it splashed on the windows in plaintiff's house, which the Sollitt Company cleaned, and that they did this about twenty-five times; that the Sollitt Company did not install the boilers in the new building.

Harry Hintz testified on behalf of the defendants that he was the timekeeper employed by the Sollitt Company; that in April, 1924, he was in plaintiff's back yard and it was then in pretty good condition because they had men every day clean it up under the superintendent's directions; that a little concrete would splash every time it was pouring and then they would have a man clean the windows;

Plaintiff offered evidence tending to show that the repairs he made were necessary because of the damage done by the tenants in the construction of the adjoining building, while the defendant offered evidence tending to show that the repairs were not as great as claimed by plaintiff.

James A. Richardson, called on behalf of the defendant, testified that he was a general mason contractor and was employed by the defendant Ralph Bellitt & Sons Construction Company to superintend the masonry in the construction of the building in question; that he also constructed the concrete and masonry work; that the defendant at the time of the construction of the building was plaintiff; that they were on friendly terms; that the Bellitt Company took down plaintiff's fence, which the witness testified was a lot over on the other property; that it was taken down with plaintiff's permission; that the parties were taken and that plaintiff stated he would like to have the fence in the old fence place on plaintiff's property, which was done; that there were some few bricks and shingles thrown in the back yard; that one of the concrete forms which was being used in the construction of the building fell on the other house and slightly weakened it; that he did not know of any other damage his company did; that in pouring concrete some of it splashed on the sidewalk in plaintiff's house, which the Bellitt Company cleaned, and that they did this about twenty-five times; that the Bellitt Company did not install the pillars in the new building; that Harry Rinder testified on behalf of the defendant that he was the foreman employed by the Bellitt Company; that in April, 1924, he was in plaintiff's back yard and it was then in pretty good condition because they had now every day clean it up under the water; that a little concrete would splash away; that in the morning and that day there was a lot of water.

that after the job was completed, about June, he had a talk with plaintiff, who asked him to clean the yard, which the Sellitt Company did; that they saw a gardner concerning some bushes to be planted and the gardner estimated the charge would be \$16. The witness conveyed this information to plaintiff, who said it was all right but later said that the defendant the Sellitt Company need not bother with it any more and that he had taken it to court; that in May prior to that time the witness had talked to plaintiff's son and the son asked them to fix things up and the witness replied that he would do so as soon as they finished the job and they got a gardner over to do the work.

Ralph Sellitt, president of the Sellitt Company, testified that his company constructed the masonry, concrete and carpenter work on the building; that they did not install the boilers; that his first conversation with the plaintiff was concerning the tearing down of the fence and plaintiff agreed that he might take it down if they would save the boards for him; that the fence was on the Berhmann property; that he had another conversation with the plaintiff in the spring of 1924, when plaintiff showed him a photograph of his house and said he had a grievance in the matter of having his premises fixed up; that the witness replied that he had fixed the place up as well as he should have done; that he cleaned the yard, fixed the chicken coop and was prepared to get him bushes and the like; that the bushes were not planted in the yard because plaintiff ordered him off; that it would cost about \$10 to repair the chicken coop.

The defendants contend that the judgment must be reversed because one of the defendants in the case was John Berhmann, Inc., a corporation, while the judgment ran against John Berhmann individually. Judgment was entered January 21, 1927, and it recites that the cause came on for hearing and that the jury returned

[illegible]

into open court their verdict as follows:

"We, the jury, find the issues against the defendants, Ralph Sellitt & Sons Const. Co., a corp., and John Behrmann, Inc., and assess the plaintiff's damages at the sum of Six Hundred and 00/100 Dollars (\$600.00)"

Continuing the order states that the defendants'

motions for a new trial and in arrest of judgment were overruled and that it was considered by the court that plaintiff have judgment on the verdict and "recover of and from the defendants Ralph Sellitt & Sons Const. Co., a corp., and John Behrmann, the damages of the plaintiff amounting to the sum of Six Hundred and 00/100 Dollars (\$600.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended, and that execution issue therefor." Then follows the prayer and allowance of appeal to this court. The appeal bond is by the two defendants correctly named.

There is no merit in the contention. The failure to add after the name of the defendant John Behrmann, "Inc., a corporation," was clearly a misprison of the clerk. We think the judgment is sufficient but the slight error will be corrected in this court.

A further point is made that the owner of the land on which a building is erected by an independent contractor is not liable for damages arising out of the contractor's negligence, and that since there was no evidence of negligence on the part of John Behrmann, Inc., a corporation, the owner of the land, and since the defendants sought to introduce as evidence two written documents purporting to be contracts between Ralph Sellitt & Sons Construction Company and the general contractor John E. Turton, Inc., which the court erroneously excluded, the judgment should be reversed to permit the introduction of this evidence. As we understand it, the argument is that if this evidence had been admitted it would have shown that John Behrmann, Inc., a corporation, had

into open court their version as follows:

"We, the jury, find the issues against the defendant, Ralph Salitt & Sons Const. Co., a corp., and John Behrmann, Inc., and assess the plaintiff's damages at the sum of six hundred and twenty dollars (\$620.00)."

Continuing the court states that the defendant's

motion for a new trial and in arrest of judgment were over-

ruled and that it was considered by the court that plaintiff's

judgment on the verdict and recovery of and from the defendant

Ralph Salitt & Sons Const. Co., a corp., and John Behrmann, Inc.

amount of the plaintiff's damages to the sum of six hundred and

twenty dollars (\$620.00) in favor of the defendant, together

with the costs by the plaintiff herein expended, and that execution

issue therefor. When follows the prayer and allowance of costs

to this court. The appeal bond is by the two defendants correctly

made.

There is no merit in the contention. The failure to

add after the name of the defendant John Behrmann, Inc., a corp.

"et al." was merely a misnomer of the clerk. We think the

judgment is not tainted but the slight error will be corrected in

this court.

A further point is made that the owner of the land on

which a building is erected by an independent contractor is not

liable for damages arising out of the contractor's negligence, and

that since there was no evidence of negligence on the part of John

Behrmann, Inc., a corporation, the owner of the land, and since the

evidence sought to introduce as evidence two written documents

purporting to be contracts between Ralph Salitt & Sons Const.

firm company and the general contractor John E. Larson, Inc.,

which the court erroneously admitted, the judgment should be re-

versed to permit the introduction of this evidence. As we under-

stand it, the argument is that if this evidence had been admitted

it would have shown that John Behrmann, Inc., a corporation, had

no control over the construction of the building, and would also have shown that Ralph Sollitt & Sons Construction Company was an independent sub-contractor.

The law is, as stated by counsel for defendants, that where it appears a building is being constructed by an independent contractor over whom the owner has no control, the owner is not liable for the negligence of the independent contractor's workmen unless there is something necessarily involved in the construction of the building that causes the damages. Eye v. Eason, 136 Mass. 471; Rosenbaum Bros. v. Devine, 271 Ill. 354. But the difficulty with the defendants' contention is that even if the two documents which they offered had been admitted, this would not show that the owner of the property, John Behrmann, Inc., a corporation, had released all control over the property during the period of construction. The two documents offered and which were excluded purported to be agreements between John E. Turton Co., a corporation, and the Ralph Sollitt & Sons Construction Co., the defendant, whereby the latter agreed to furnish all labor and material and to erect and complete the masonry, concrete and carpenter work on the building in question "in accordance with your proposal of even date, copy of which is herewith attached." What the proposal was does not appear because there was no copy attached to the documents offered. Nor was there any evidence offered to show that John E. Turton Co. had complete charge of the construction of the entire building, and that the owner, the defendant John Behrmann, Inc., had released all control over it during the period of construction. We think the evidence received and offered was entirely insufficient to relieve the owner of the land in the instant case from damages claimed by the plaintiff. In this view, it is obvious that the court did not err in refusing to instruct the jury as requested by the defendant to the effect that an owner of property is not liable for the torts of an independent contractor because, as stated, the

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evidence on this point was insufficient to show that the owner had released all control over the property during the period of construction.

Plaintiff offered evidence as to the amounts he had paid for making the necessary repairs, but the evidence is not satisfactory. It does not show that the defendant Ralph Sellitt & Sons Construction Co. caused all the damage which the plaintiff complains of. Plaintiff offered evidence to the effect that his property had been damaged by reason of the installation of boilers in the new building, but the evidence shows without dispute that defendant Ralph Sellitt & Sons Construction Company did not install the boilers or have anything to do with them. Plaintiff's evidence also shows that he expended \$315 in building a sunporch in the rear of his house, but we think the evidence shows that Sellitt & Sons company was not liable for this item. There is no contention that John Hermann, Inc., a corporation, caused any of the damage except by virtue of the fact that it owned the premises upon which the new building was erected.

Upon a careful consideration of all the evidence in the record, we are of opinion that if plaintiff receives \$135.20 which he paid to the landscape gardner, \$132 paid to the painter and decorator, and \$10 for repairing the chicken coop, making a total of \$267.20, it would recompense him for the damages he has sustained. If, therefore, plaintiff will within ten days remit the balance of the \$600, viz. \$332.80, judgment will be entered here in his favor and against the defendants for \$267.20; otherwise the judgment will be reversed and the cause remanded; each party will be required to pay one-half of the costs in this court.

AFFIRMED UPON REMITTITUR; OTHERWISE
REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

evidence on this point was insufficient to show that the owner had released all control over the property during the period of construction.

Plaintiff offered evidence as to the amount he had paid for making the necessary repairs, but the evidence is not satisfactory. It does not show that the defendant Ralph Solitt & Sons Construction Co. caused all the damage which the plaintiff complains of. Plaintiff offered evidence to the effect that his property had been damaged by reason of the installation of bellows in the new building, but the evidence shows without dispute that defendant Ralph Solitt & Sons Construction Company did not install the bellows or have anything to do with them. Plaintiff's evidence also shows that he expended \$215 in building a wing on the rear of his house, but we think the evidence shows that Solitt & Sons company was not liable for this item. There is no contention that John Ber mann, Inc., a corporation, caused any of the damage except by virtue of the fact that it owned the premises upon which the new building was erected.

When a careful consideration of all the evidence in the record, we are of opinion that it is plaintiff's responsibility which he paid to the landscape gardener, \$115 paid to the window and door, and \$10 for repairs, the chicken coop, making a total of \$125.50. It would reimburse him for the damages he has sustained.

Therefore, plaintiff will within ten days remit the balance of \$125.50, and judgment will be entered in favor of the defendant for \$207.50; otherwise the judgment will be entered and the same remitted; each party will be required to pay the amount of the costs in this case.

ENTERED UPON RECORDED: OCTOBER 11, 1917.
RECORDED AND INDEXED.

Witness my hand and the seal of the Court at New Haven, Connecticut, this 11th day of October, 1917.

Attest: J. J. and Henry, Jr., Clerks.

156 - 32087

CARL LIND,

Appellee,

v.

HARRY M. ENGLESTEIN, ET AL,
ETC.,

Appellants.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 11, 1924, Carl Lind, as plaintiff, brought suit in assumpsit, in the Circuit Court, against Harry M. Englestein and Louis Englestein, doing business as Harry M. & Louis Englestein, as defendants. There was a trial before the Court, with a jury, which resulted in a verdict in favor of the plaintiff against the defendants in the sum of \$7,688.00. This appeal is from that judgment.

The plaintiff filed a declaration, consisting of the common counts, and two special counts; and the defendants filed a plea of the general issue.

In July, 1922, the plaintiff, Lind, the owner of certain real estate at 6345 South Peoria Street in Chicago, as the result of advertising in the Englewood Economist, and through correspondence with the defendants, listed his property with the latter for sale. A short time afterwards, he received a letter from the defendants, notifying him that they had some one who would buy the property if the price was right. He received a telephone call from the

24-1-14

1st - 1934

JAMES LIND

Appellee

AND THE BOARD OF

V.

THE BOARD

HARRY M. ENGELSTEIN, ET AL.

Appellants

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

Opinion filed March 29, 1934.

MR. PRESIDING JUSTICE TAYLOR delivered the

opinion of the court.

On January 11, 1934, Carl Lind, as plaintiff,

branded suit in rem against, in the Circuit Court, against

Harry M. Engelstein and Louis Engelstein, doing business

as Harry M. & Louis Engelstein, as defendants. There was

a trial before the court, with a jury, which resulted in

a verdict in favor of the plaintiff against the defendants

in the sum of \$7,500.00. This appeal is from that judgment.

The plaintiff filed a declaration, consisting

of the common counts, and two special counts; and the

defendants filed a plea of the general issue.

In July, 1932, the plaintiff, Lind, the owner

of certain real estate at 6325 North Paulina Street in Chicago,

as the result of advertising in the Englewood Economist,

and through correspondence with the defendants, listed

his property with the latter for sale. A short time after-

wards, he received a letter from the defendants, notifying him

that they had come one who would buy the property if the

price was right. He received a telephone call from the

defendants' office that a Mrs. Beuder would buy the property, and the next day one Lawrence A. Smith who was an employee in the office of the defendants, called to see him and told him that Mrs. Beuder would buy the property. The plaintiff told Smith that the price was \$13,500.00. Smith told the plaintiff that Mrs. Beuder had been to the defendants' office and wanted to buy the property. Shortly afterwards, Mrs. Beuder went to see him, the plaintiff, at his flat, and he agreed to sell the property to her. She paid \$500.00 down as a deposit, after the contract was made. Smith made out the contract at his, the plaintiff's, flat. The plaintiff wanted all cash; but Mrs. Beuder said she would pay \$500.00 and would be willing to take over the property on the condition that he would take a \$5,000.00 first mortgage and a \$8500.00 second mortgage, and accept the balance in installments of \$75.00. Accordingly, as stated above, a contract, dated August 24, 1922, was executed; the price being \$13,500.00. About ten days later, Mrs. Beuder's daughter came to him and told him that her mother was ill and felt that she had paid too much for the property, and wished to cancel the contract. The plaintiff then referred Mrs. Beuder to the defendants. She went to their office and there was some talk about cancelling the contract; and the contract was then cancelled. Later the plaintiff received a telephone call from the defendants' office, and, according to his testimony, talked with one of the firm. He testified that the one he talked to said they would advertise the property for sale, at Mrs. Beuder's expense;

defendants' office that a Mrs. Bender would pay the property, and the next day one Lawrence A. Smith who was an employee in the office of the defendants, called to see him and told him that Mrs. Bender would pay the property. The plaintiff told Smith that she knew was \$15,000.00. Smith told the plaintiff that Mrs. Bender had been to the defendants' office and wanted to buy the property. Shortly afterwards, Mrs. Bender went to see him, the plaintiff, at his time, and he agreed to sell the property to her. She paid \$500.00 down as a deposit, after the contract was made. Smith made out the contract at this, the plaintiff's, flat. The plaintiff wanted all cash; but Mrs. Bender said she would pay \$500.00 and would be willing to take over the property on the condition that he would take a \$5,000.00 first mortgage and a \$3500.00 second mortgage, and accept the balance in installments of \$75.00. Accordingly, he executed a contract, dated August 24, 1923, was executed, the price being \$15,000.00. About ten days later, Mrs. Bender's daughter came to him and told him that her mother was ill and said that she had paid the cash for the property, and asked to cancel the contract. The plaintiff then referred Mrs. Bender to the defendants. She went to their office and there was some talk about cancelling the contract; and the contract was then cancelled. Later the plaintiff received a telephone call from the defendants' office, and, according to his testimony, talked with one of the firm. He testified that the one he talked to said they would advertise the property for sale, at Mrs. Bender's expense;

that he, the plaintiff, said, "that is all right." The property was thereafter advertised several times in the Chicago Tribune for \$13,500.00. Later, he received a telephone call from the defendants' office, and was told that they were not able to sell the property for that price. The defendants then told Smith to see the plaintiff. Smith did so and told the plaintiff that Mrs. Beuder said the price was too high. Somewhere in the neighborhood of three months later he, the plaintiff, called up the defendants' office and asked one of the defendants why the property could not be sold, and was told that they, the defendants, would send up a man to talk it over with him. Thereafter, Smith came to him and told him it was hard to sell the property at that price. Smith told him that Mrs. Beuder had been promising to buy it for \$11,500.00. After some further advertising, the property was sold to Mrs. Beuder. The plaintiff testified that although there were other applicants at that price, he gave her the preference because she had already paid a deposit.

All the advertisements of the property referred applicants to the office of Harry M. and Louis Englestein. Their office was at 60th and Halsted streets, and bore on the windows the words, "Real Estate, Loans and Insurance," and the names of the defendants. The plaintiff testified that he frequently passed the office and saw Smith in there doing business behind a desk among the rest of the employees.

After Mrs. Beuder had agreed to purchase the property for \$11,500.00, he, Smith, went over to her house,

that he, the plaintiff, said, "that is all right." The property was thereafter advertised several times in the Chicago Tribune for \$12,500.00. Later, he received a telephone call from the defendant's office, and was told that they were not able to sell the property for that price. The defendant then told Smith to see the plaintiff. Smith did so and told the plaintiff that Mrs. Bender said the price was too high. Somewhere in the neighborhood of three months later he, the plaintiff, called up the defendant's office and asked one of the defendants why the property could not be sold, and was told that they, the defendants, would send up a man to talk it over with him. Thereafter, Smith came to him and told him it was hard to sell the property at that price. Smith told him that Mrs. Bender had been promising to pay it for \$12,500.00. After some further conversation, the property was sold to Mrs. Bender. The plaintiff testified that although there were other applicants at that price, he gave her the preference because she had already paid a deposit.

All the advertisements of the property referred applicants to the office of Harry K. and Louis Englestein. Their office was at 808 and Halsted streets, and bore on the windows the words, "Real Estate, Loans and Insurance," and the names of the defendants. The plaintiff testified that he frequently passed the office and saw Smith in there doing business behind a desk among the rest of the employees.

After Mrs. Bender had agreed to purchase the property for \$12,500.00, he, Smith, went over to her house,

and a contract was drawn and signed, the price being fixed at that figure. The terms were a first mortgage of \$5,000.00, and a second mortgage of \$2500.00, and \$3500.00 in cash; the \$2500.00 second mortgage to be paid off in monthly installments of \$75.00. At the time of making the contract, the plaintiff turned over both the \$5,000.00 mortgage and notes, and the \$2500.00 mortgage and notes to Smith. The plaintiff testified that they were turned over to Smith on the condition that the defendants would dispose of the first mortgage free of charge and without commission and collect the installments on the second mortgage; that that was the conversation with Smith in Mrs. Beuder's house when the papers were turned over.

In the course of the next few months, the plaintiff, received various checks from the defendants, the first being for \$200.00, and the second, about \$150.00. He received altogether \$600.00.

On January 17, 1923, he received a letter, on the office paper of the defendants, signed by Smith, informing him that Mrs. Beuder would soon close a deal and would get considerable money and would pay off the second mortgage. On February 28, 1923, he received another letter on the stationery of the defendants and signed by Smith, notifying him that he, Smith, was working on the sale of the first mortgage and "expect an offer soon for same without commission." Of the \$600.00 paid the plaintiff testified that \$268.50 was paid in cash by Smith.

Sometime in March, 1923, having received a postal

and a mortgage was drawn and signed, the price being fixed at that figure. The terms were a first mortgage of \$5,000.00 and a second mortgage of \$2,500.00, and \$1,500.00 in cash; the \$5,000.00 second mortgage to be paid off in monthly installments of \$75.00. At the time of making the contract, the plaintiff turned over both the \$5,000.00 mortgage and notes, and the \$2,500.00 mortgage and notes to Smith. The plaintiff testified that they were turned over to Smith in the course of the business and without commission and without the plaintiff's knowledge on the second mortgage; that that was the transaction with Smith in Mrs. Hudson's house when the papers were turned over.

In the course of the next few months, the plaintiff received various checks from the defendants, the first being for \$500.00, and the second, about \$150.00. He received a letter from them.

On January 14, 1923, he received a letter, on the office paper of the defendants, signed by Smith, informing him that Mrs. Hudson would soon close a deal and would get considerable money and would pay off the second mortgage. On February 22, 1923, he received another letter on the same paper of the defendants and signed by Smith, notifying him that he, Smith, was working on the sale of the first mortgage and hoped an offer would come without commission. At the \$500.00 paid the plaintiff testified that \$250.00 was paid to him by Smith.

Sometime in March, 1923, having received a postal

card in regard to the repair of the sidewalk, he went over to Mrs. Beuder's to give it to her, and when he asked her about the next installment on the second mortgage, she showed him the contract and that she had already paid, at the office of Harry M. and Louis Englestein, the defendants, altogether \$1900.00 on the second mortgage note of \$2500.00. When asked by the Court if he remembered that at the time he examined the contract it showed receipts for \$1900.00 paid, he answered in the affirmative. In the course of the trial, counsel for the defendant stated that he would stipulate that Mrs. Beuder paid on the second mortgage, prior to the later return of it to the plaintiff, the sum of \$1875.00, together with interest amounting to \$35.17, making a total of \$1910.17. The next day, after receiving that information from Mrs. Beuder, he went to the defendants' office, and Smith was there. The plaintiff testified that on that occasion the defendants said they were not responsible for Smith's dealings; that Smith said, in their presence, that "they knew he put the first mortgage and the second mortgage in the vault (the defendants' vault) there for that purpose;" that Smith said that "Harry and Louis Englestein were the only two that knew the combination of the safe, and that Mrs. Beuder's contract and the \$5,000.00 mortgage, that was in a special envelope, I remember that, with her name on it; * * * and that * * * in regard to the sale of the mortgage, Harry and Louis Englestein told him (Smith) to see some of the customers they had expected to sell the mortgage to * * "; that he did not succeed to sell it to these customers, but they advertised in the Tribune three or four times, and the only answers to that ad came from Mr. Harman, who came to the office;" that Harman went to see the pro-

and in regard to the return of the amount, he went over
to Mrs. Hendon's to give it to her, and when he asked her
about the next installment on the second mortgage, she showed
him the contract and that she had already paid, at the office
of Harry M. and Louis Englestein, the last month, \$1,000.00,
\$1,000.00 on the second mortgage to her of \$2500.00. When asked
by the Court if he remembered that at the time he explained
the contract it showed receipts for \$1500.00 paid, he an-
swered in the affirmative. In the course of the trial, counsel
for the defendant stated that he would stipulate that Mrs.
Hendon paid on the second mortgage, prior to the later return
of it to the plaintiff, the sum of \$1500.00, together with
interest amounting to \$261.17, making a total of \$1761.17.
The next day, after receiving that information from Mrs. Hendon,
he went to the defendant's office, and said that there.
He testified that on that occasion the defendant said
they were not responsible for Mrs. Hendon's dealings; that said
said, in their presence, that they knew he had the first
mortgage and the second mortgage in the name of (the defendant's
wife) there for that purpose; that said said that "Harry
and Louis Englestein were the only two that knew the
title of the sale, and that Mrs. Hendon's counsel and the
\$5,000.00 mortgage, that was a smaller mortgage, I remember
that, with her name on it, and that " " " in regard to the
sale of the mortgage, Harry and Louis Englestein told him
(said) to see some of the witnesses they had expected to call
the mortgage to " " " that he did not succeed to sell it to
these witnesses, but they advertised in the Tribune three or
four times, and the only answers to that ad came from Mr.
Kahan, who came to the witness that Kahan went to see the pro-

perty and then decided to buy the \$5,000.00 mortgage.

It is stated by counsel for the defendant that there is no question but that the \$5,000.00 first mortgage received by the plaintiff for the sale of the property, was sold by Smith to Harran. Harran testified that he turned the \$5,000.00 over to him, Smith. It is the testimony of the plaintiff that he paid a commission of \$345.00 to the defendants at the time of the closing of the sale to Mrs. Bauder; that the money was paid directly to Smith.

It is the evidence of Harran that he saw an advertisement in the Tribune about March 1, 1923, in reference to the \$5,000.00 mortgage being for sale; that he answered it in writing, and received an answer; that the answer directed him to go to Englestein's on Halsted street; that he went there and had a conversation with Smith, telling him about the advertisement; that they then went and looked at the property; that after that Smith looked after the papers and got everything fixed up, and then they went to the Greenebaum Bank; that there he paid Smith the \$5,000.00, and that he, Harran took the papers away with him; that since then he has been paid the interest every six months; that that occurred sometime in March, 1923.

It is the evidence of Louis Englestein that he and his brother were in the real estate business, but not in the loan business; that Smith was one of their employees; that they had secured his services by inserting an advertisement in a newspaper for a real estate salesman; that before employing him they had asked for and received references as to his

party and then decided to pay the \$2,000.00 mortgage.

It is noted by counsel for the defendant that there is no question but that the \$2,000.00 first mortgage received by the plaintiff for the sale of the property, was sold by Smith to Hartman. Hartman testified that he turned the \$2,000.00 over to him, Smith. It is the testimony of the plaintiff that he paid a commission of \$250.00 to the defendant at the time of the closing of the sale to Mrs. Gaudet; that the money was paid directly to Smith.

It is the evidence of Hartman that he saw an advertisement in the Tribune about March 1, 1932, in reference to the \$2,000.00 mortgage being for sale; that he answered it in writing, and received an answer; that the answer directed him to go to Englestein's on Kalzed street; that he went there and had a conversation with Smith, telling him about the advertisement; that they then went and looked at the property; that after that Smith looked at the papers and got everything fixed up, and then they went to the Queenstown Hotel; that there he paid Smith the \$2,000.00, and that he, Hartman took the papers away with him; that since then he has been paid the interest every six months; that that occurred sometime in March, 1932.

It is the evidence of Louis Englestein that he and his brother were in the real estate business, but not in the loan business; that Smith was one of their employees; that they had secured his services by inserting an advertisement in a newspaper for a real estate salesman; that before employ- ing him they had asked for and received references as to his

honesty; that when the plaintiff first came to see him with reference to the loss of his mortgages he, Englestein, told the plaintiff that Smith had been away for two or three days, and suggested that the plaintiff get an attorney. Louis Englestein further testified that the only persons who signed checks on the bank account of the defendants were himself and his brother, and that he had never signed any check to the order of the plaintiff. Louis Englestein denied that Smith stated that the defendants knew that the plaintiff had the mortgages in the vault and had given him, Smith, the names of persons to whom he might make a sale of them. That was also denied by Harry Englestein.

The \$2500.00 note was found in the vault of the defendants, the vault being a large safe. It was in an envelope marked, "Lawrence A. Smith, Personal," and was subsequently delivered by Harry Englestein to the plaintiff.

The bookkeeper and cashier for the defendants, testified that no checks were issued by the defendants to the plaintiff after the transaction between the plaintiff and Mrs. Heuder was closed.

Evidence was introduced on behalf of the plaintiff in regard to information which was given by Meyer Morton to Harry M. Englestein, in the later part of September, or the early part of October, 1922, concerning the character and conduct of Smith. Morton testified that he had known Harry Englestein for six or seven years; that shortly after he found that Smith was working for the defendants, he called Harry Englestein on the telephone and told him he would

person; that when the plaintiff first came to see him with reference to the loss of his suitcase he, Englestein, told the plaintiff that Smith had been away for two or three days, and suggested that the plaintiff get an attorney. Louis Englestein further testified that the only persons who signed checks on the bank account of the defendants were himself and his brother, and that he had never signed any check for the order of the plaintiff. Louis Englestein denied that Smith stated that the defendants knew that the plaintiff had the suitcase in the vault and had given him, Smith, the names of persons to whom he might make a sale of them. That was also denied by Harry Englestein.

The \$2500.00 note was found in the vault of the defendants, the vault being a large safe. It was in an envelope marked, "Lawrence A. Smith, Personal," and was immediately delivered by Harry Englestein to the plaintiff.

The bookkeeper and cashier for the defendants testified that no checks were issued by the defendants to the plaintiff after the transaction between the plaintiff and Mrs. Bender was closed.

Evidence was introduced on behalf of the plaintiff in regard to information which was given by Meyer Kerson to Harry M. Englestein, in the latter part of September, or the early part of October, 1935, concerning the character and conduct of Smith. Kerson testified that he had known Harry Englestein for six or seven years; that shortly after he found that Smith was working for the defendants, he called Harry Englestein on the telephone and told him he would

like to see him; that he met him a day or two afterwards and told him that it had come to his attention that a man by the name of Lawrence Smith was working for him; that he, himself, had had some transactions with Smith and had known him for a number of years; that some short time prior to that he had discovered that Smith had sold him, Morton, and some clients of his, some fictitious and forged notes, some supposed to be secured by second mortgages and some by first; that he had discovered that the notes were forged or fictitious, and as a result had suffered the loss of a substantial sum of money; that he then asked Englestein the nature of Smith's employment; that Englestein told him "that he was employed as a salesman on a commission basis, and possibly with a drawing account, I am not certain of that," that he told Englestein of the friendship that existed between him and Englestein and that he was interested in Smith's employment because Smith had promised to make restitution of the money he had swindled him and his clients out of; that from an investigation he made, he found that Smith had no funds whatever and had used the money in fast living; that the only chance he, Morton, saw to get restitution was to get it from money earned in any employment Smith might get; that Englestein said he was much surprised to learn about it; that it was news to him; that Smith had come fairly well recommended; that Harry Englestein then called his brother Louis on the telephone and told him that he wished to speak to him as soon as he got back that afternoon about something very important; that Harry said he would look into it and discuss it with his brother, and that

like to see him, that he met him a day or two afterwards
and told him that it had come to his attention that a man
by the name of Lawrence Smith was working for him; that he,
himself, had had some transactions with Smith and had known
him for a number of years; that some short time prior to
that he had discovered that Smith had sold him, Norton,
and some clients of his, some fictitious and forged notes,
some supposed to be secured by second mortgages and some by
first; that he had discovered that the notary who forged on
fictitious, and as a result had suffered the loss of a sub-
stantial sum of money; that he then asked Englestein the
nature of Smith's employment; that Englestein told him
"that he was employed as a salesman on a commission basis,
and possibly with a drawing account, I am not certain of
that"; that he told Englestein of the friendship that existed
between him and Englestein and that he was interested in
Smith's employment because Smith had promised to make restitu-
tion of the money he had swindled him and his clients
out of; that from an investigation he made, he found that
Smith had no funds whatever and had used the money in lost
living; that the only change he, Norton, saw to get restitu-
tion was to get it from money earned in any employment Smith
might get; that Englestein said he was much surprised to
learn about it; that it was news to him; that Smith had
come fairly well recommended; that Harry Englestein then
called his brother Louis on the telephone and told him that
he wished to speak to him as soon as he got in on that after-
noon about something very important; that Harry said he
would look into it and discuss it with his brother, and that

Louis and he would let him, Morton, know what they were going to do, if anything. On cross-examination, Morton testified that the matter between him and Smith took place about a year before the time he spoke to Harry Englestein about it.

At the close of the evidence, sixteen instructions were given on behalf of the plaintiff, and thirteen on behalf of the defendants, and eight offered on behalf of the defendants were refused.

It is contended for the defendants (1) that the Court should have directed the jury to find the issues for the defendants upon the whole case, and also upon each count of the declaration; (2) that there was no proof of express or implied authority on the part of the employee Smith with reference to the matters involved; (3) that even if the plaintiff, was entitled to recover under the common counts upon the theory of money had and received, the evidence does not support a verdict in the sum of \$7,688; (4) that the court erred in refusing to permit the witness Louis Englestein to testify as to the character of the work of the employee Smith, and in striking out the answer of the witness with reference thereto; and (5) that each of the thirteen instructions given for the plaintiff was erroneous.

As to the claim that the Court should have directed the jury to find the issues for the defendants upon each count of the declaration, and that there was no proof of express or implied authority on the part of the employee Smith with reference to the transactions herein involved,

Louis and he would let him, Boston, know what they were going to do, if anything. Of course-examination, Boston testified that the matter between him and Smith took place about a year before the time he spoke to Harry Englestein about it.

At the close of the evidence, sixteen instructions were given on behalf of the plaintiff, and thirteen on behalf of the defendant, and eight others on behalf of the defendant were refused.

It is contended for the defendant (1) that the Court should have directed the jury to find the issues for the defendant upon the whole case, and also upon each count of the declaration; (2) that there was no proof of express or implied authority on the part of the employee Smith with reference to the matters involved; (3) that even if the plaintiff was entitled to recover under the common counts upon the theory of money had and received, the evidence does not support a verdict in the sum of \$7,680; (4) that the court erred in refusing to permit the witness Louis Englestein to testify as to the character of the work of the employee Smith, and in striking out the answer of the witness with reference thereto; and (5) that each of the thirteen instructions given for the plaintiff was erroneous.

As to the claim that the Court should have directed the jury to find the issues for the defendant upon each count of the declaration, and that there was no proof of express or implied authority on the part of the employee Smith with reference to the transactions herein involved,

we cannot agree with the contention of counsel for the defendants. It is admitted that Smith was their employee at the time in question. He was employed to help in the business of the defendant, and was compensated on a commission basis. That he was their agent is admitted, and it is also admitted that for his services as their agent they collected compensation, giving him his share. In this particular matter, they received the real estate commission and retained it, even after they knew that Smith had embezzled the money which should have been paid to the plaintiff.

The plaintiff testified that after the first contract was cancelled, he received a telephone call from the defendants' office, and talked with one of the firm; that he was told that they would advertise the property for sale, and he said that was all right; that the property was thereafter advertised several times in the Chicago Tribunes; and that later he received another telephone call from the defendants' office. The matter then went on for about three months, when the plaintiff again called up the defendants' office and asked one of the defendants, so he stated, why the property could not be sold, and he was told that the defendants would send up a man to talk it over with him. As a result of that, Smith went to him, and then after further advertising, it was finally sold to Mrs. Beuder. The plaintiff testified that although there were other applicants at the price, he gave her the preference because she had already paid a deposit. Then, too, the advertisements of the property referred applicants to the office of Harry and Louis Englestein, and their office bore on the windows the words, "Real Estate, Loans and Insur-

we cannot agree with the contention of counsel for the defendant. It is admitted that Smith was their employee at the time in question. He was employed to help in the business of the defendant, and was compensated on a commission basis. That he was their agent is admitted, and it is also admitted that for his services as their agent they collected and compensation, giving him his share. In this particular matter, they received the real estate commission and retained it, even after they knew that Smith had collected the money which should have been paid to the plaintiff.

The plaintiff testified that after the first contract was cancelled, he received a telephone call from the defendant's office, and talked with one of the firm; that he was told that they would advertise the property for sale, and he said that was all right; that the property was thereafter advertised several times in the Chicago Tribune; and that later he received another telephone call from the defendant's office. The answer then went on for about three months, when the plaintiff again called up the defendant's office and asked one of the defendants, as he stated, why the property would not be sold, and he was told that the defendant would send up a man to talk it over with him. As a result of that, Smith went to him, and then after further advertising, it was finally sold to Mrs. Bender. The plaintiff testified that although there were other applicants at the time, he gave her the property once because she had already paid a deposit. That too, the advertisements of the property referred applicants to the office of Harry and Louis Ingels, and their office boys on the windows the words, "Real Estate, Loans and Insurance".

ance," and the names of the defendants. Finally, when the sale was being made and the contract drawn, the price having been agreed upon, the mortgages and notes were turned over to Smith; and the plaintiff testified that they were turned over on the condition that the defendants would dispose of the first mortgage free of charge and without commission, and collect the installments on the second mortgage; that that was the conversation with Smith and Mrs. Beuder's house when the papers were turned over.

The defendants had already received their commission, and what they were to do in the way of selling the \$5,000.00 note and mortgage and collect on the \$3500.00 note, evidently, constitute part of their services in order to complete what was agreed upon at the time the property was sold to Mrs. Beuder. There was nothing extraordinary in the fact that the defendants should undertake, as part of their consideration for the commission, to sell the \$5,000.00 note and mortgage and collect on the \$3500.00 note; and it cannot reasonably be said that Smith, employed as he was in a transaction which finally included not only a sale of the property, but a sale of part of the securities received as the purchase price, did anything outside of what might be considered within the normal scope of his employment.

The evidence shows that the first authority which the plaintiff gave to the defendants was to sell the property for cash, and that later, as the defendants

and the names of the defendants, finally, when the sale was being made and the contract drawn, the price having been agreed upon, the mortgages and notes were turned over to Smith; and the plaintiff testified that they were turned over on the condition that the defendants would dis- pose of the first mortgage free of charge and without com- mission, and collect the installments on the second mort- gage; that that was the conversation with Smith and Mrs. Smith's house when the papers were turned over.

The defendants had already received their commis- sion, and what they were to do in the way of selling the \$5,000.00 note and mortgage and collect on the \$2500.00 note, evidently, constituting part of their services in order to complete what was agreed upon at the time the property was sold to Mrs. Becker. There was nothing extraordinary in the fact that the defendants should undertake, as part of their consideration for the commission, to sell the \$5,000.00 note and mortgage and collect on the \$2500.00 note; and it cannot reasonably be said that Smith, employed as he was in a transaction which finally included not only a sale of the property, but a sale of part of the proceeds received as the purchase price, did anything outside of what might be considered within the normal scope of his business.

The witness shows that the first authority which the plaintiff gave to the defendants was to sell the property for cash, and that later, as the defendants

were not able to sell it for cash, that Smith persuaded the plaintiff to sell, provided the defendants would take the securities which were turned over as part of the purchase price and undertake to sell one of them and collect the other. The evidence really shows in order to accomplish the sale, for which the defendants would have received, and did receive, a commission, it was necessary to assume an obligation to undertake to sell the \$5,000.00 note and to collect the \$3500.00, and that the defendants, through their agent and their own conduct, took upon themselves that obligation. When then, in addition to that, it was shown that the money for the \$5,000.00 note and part of that collected upon the \$3500.00 note had been embezzled by Smith, an employee - whom they were obviously guilty of negligence in employing - it followed that they, the defendants, were liable in full for whatever loss was suffered by the plaintiff. Surba v. Baltic American Line, 233 Ill. App. 132; Faber-Muser v. Dee Clay Co., 291 Ill. 240; Kenpton Farmers Elevator Co. v. Lowitz, et al, 231 Ill. App. 273; Phillips v. Continental Auto Ins. Assn. 237 Ill. App. 46; Beckstrom Co. v. Armstrong P. & V. Wks. 230 Ill. App. 528; Babcock v. Bagelin, 198 Ill. App. 432.

It is contended that the court erred in refusing to permit the witness Louis Englestein to testify as to the character of the work of the employee Smith, and in striking out an answer of the witness in reference to that subject. Counsel for the defendants state in their brief that, without question, the testimony of the witness Meyer Morton on behalf

were not able to sell it for cash, that said defendant
 the plaintiff to sell, provided the defendant would take the
 securities which were turned over as part of the purchase
 price and undertake to sell one of them and collect the
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 the sale, for which the defendant would have received,
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 defendants, were liable in full for whatever loss was
 suffered by the plaintiff. Smith v. Smith American Line,
253 Ill. App. 123; First-Trust v. New Day Co., 251 Ill. 240;
London Partners v. Lewis, 251 Ill. 240.
251 Ill. App. 123; First-Trust v. New Day Co., 251 Ill. 240;
London Partners v. Lewis, 251 Ill. 240.

question, the testimony of the witness Meyer Norton on behalf counsel for the defendant rests in their belief that, without out an answer of the witness in reference to that subject. character of the work of the employee Smith, and in arriving to permit the witness Louis Englestein to testify as to the and 22-30 It is contended that the court acted in refusing

of the plaintiff, did tend to prove negligence on the part of the defendants in retaining Smith in their employ, and that in determining whether or not the defendants were actually guilty of negligence, the testimony of the defendant Louis Englestein that Smith was industrious in his work should have been allowed to stand, and also that the question put to Louis Englestein, "what was the quality of the work of Smith to your knowledge during the time he worked for you?" should have been permitted to be answered. When Louis Englestein was asked by his counsel, "State whether or not he (meaning Smith) was industrious in his work, or otherwise," he answered, "Yes", and upon objection by counsel for the plaintiff, the Court struck out the answer, stating that it was immaterial. The question asked for the witness's opinion and for an opinion upon a subject which in no way pertained to the question of his character as to honesty, and was, therefore, doubly objectionable.

It is contended that the plaintiff was not entitled to recover either upon the common or the special counts of the declaration. With that we cannot agree. The evidence, as we have it set forth above, amply justified recovery for money had and received, (Babcock v. Reglein, *supra*) and the jury was instructed at the instance of the defendant upon that subject only. Then, too, the verdict was obviously only for the amount of money had and received, with appropriate interest.

As to the instructions. We have considered the argument of counsel for the defendants in regard to each of the thirteen instructions objected to, and are of the

of the plaintiff, did tend to prove negligence on the part of the defendant in retaining Smith in their employ, and that in determining whether or not the defendants were actually guilty of negligence, the testimony of the defendant and Louis Englestein that Smith was incompetent in his work should have been allowed to stand, and also that the question of the quality of the work of Smith to your knowledge during the time he worked for you should have been permitted to be answered. When Louis Englestein was asked by his counsel, "Please answer or not?" (meaning Smith) was incompetent in his work, or otherwise," he answered, "Yes", and upon objection by counsel for the plaintiff, the court struck out the answer, stating that it was immaterial. The question asked for the witness's opinion and for an opinion upon a subject which in no way pertained to the question of his character as to honesty, and was, therefore, doubly objectionable.

It is contended that the plaintiff was not entitled to recover either upon the common or the special counts of the declaration. In that we cannot agree. The evidence as we have it set forth above, amply justified recovery for money had and received. (Whitcomb v. Kearsley, supra) and the jury was instructed as the instances of the defendant upon that subject only. Then, too, the verdict was obviously only for the amount of money had and received, with appropriate interest.

As to the instructions. We have considered the argument of counsel for the defendant in regard to each of the thirteen instructions objected to, and are of the

opinion that no substantial error in regard to them was made. The evidence is quite one-sided, and in such a case, slight errors in instructing the jury are not sufficient to override a just verdict. The thirteen instructions given for the defendants, were more favorable to the claims of the defendants than the law justified.

Considering all the instructions, which were very elaborate and numerous, we do not feel justified in holding that the jury was in any substantial way erroneously instructed on behalf of the plaintiff.

As to the amount of the judgment. There were two notes, one for \$5,000.00, secured by a first mortgage, and one for \$3500.00, secured by a second mortgage, both dated October 20, 1922, and bearing interest at the rate of 6 per cent per annum. The plaintiff received only the sum of \$1300.00 in the way of principal, leaving a balance due of \$6200.00, with interest. That amount with interest from October 20, 1922 to February 2, 1927, amounts to something more than \$7,688.00, the amount of the verdict. The judgment, therefore, is not excessive.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

opinion that no substantial error in regard to them was made. The evidence is quite one-sided, and in such a case, slight errors in instructing the jury are not sufficient to override a just verdict. The thirteen instructions given for the defendants, were more favorable to the claims of the defendants than the law justified.

Considering all the instructions, which were very complete and numerous, we do not feel justified in holding that the jury was in any substantial way erroneously instructed on behalf of the plaintiffs.

As to the amount of the judgment. There were two notes, one for \$5,000.00, secured by a first mortgage, and one for \$2500.00, secured by a second mortgage, both dated January 1, 1922, and bearing interest at the rate of 6 per cent per annum. The plaintiff received only the sum of \$1200.00 in the way of principal, leaving a balance due of \$3800.00, with interest. That amount with interest from October 20, 1922 to February 2, 1927, amounts to something more than \$7,000.00, the amount of the verdict. The judgment, therefore, is not excessive.

For the reasons stated, the judgment will be

affirmed.

W. H. HARRIS

Attorney for the defendant

ROBERT AND WILSON, JR. CORP.

346 I.A. 645

207 - 32148

READY & CALLAGHAN COAL COMPANY,
a corporation,

Appellee.

v.

TOWN OF CICERO, (a municipal corporation,) et al

Appellants.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is an appeal from an order entered in the
Circuit Court on July 15, 1927, that the defendants,
Joseph Z. Klenha, Peter E. Gieldzinski, and Frank Houcek,
President, Treasurer and Clerk, respectively, of the Town
of Cicero, be committed to the common Jail of the County
of Cook, and State of Illinois, and remain charged with
contempt of court until they pay the sum of \$8,688.31 into
court for the use of the complainant, or until released by
due process of law, and that a mittimus for their commitment
issue forthwith to be executed by the Sheriff of Cook County.

The matters here involved arise out of certain
contracts which were entered into between Ready & Callaghan
Coal Company and the Town of Cicero, for the paving of
48th Avenue and other streets in that town. The complainant,
Ready & Callaghan Coal Company (here the appellee), filed
its bill to enjoin the Town of Cicero from paying out funds

READY & McALLISTER COAL COMPANY
a corporation

Appellee

CIRCUIT COURT,
COOK COUNTY.

Town of Chicago, (a municipal cor-
poration), et al

Appellants

Opinion filed March 29, 1932.

MR. PRESIDING JUSTICE TAYLOR delivered the

opinion of the court.

This is an appeal from an order entered in the

Circuit Court on July 12, 1931, that the defendants,

Joseph E. Kinkead, Peter E. Stelmanski, and Frank Hovick,

President, Treasurer and Clerk, respectively, of the Town

of Chicago, be committed to the common jail of the County

of Cook, and State of Illinois, and remain charged with

contempt of court until they pay the sum of \$3,000.00 into

court for the use of the complainant, or until released by

the process of law, and that a writ of habeas corpus be

issued forthwith to be executed by the Sheriff of Cook County.

The matters here involved arise out of certain

contracts which were entered into between Ready & McAllister

Coal Company and the Town of Chicago, for the paying of

43rd Avenue and other streets in that town. The complainant,

Ready & McAllister Coal Company (here the appellee), filed

its bill to enjoin the Town of Chicago from paying out funds

in certain Special Assessments numbered 1083, 1084 and 1089, for other purposes, and for an accounting as to certain matters of repairs made by the complainant. After certain hearings in that cause before the Master in Chancery, and argument before the Court on exceptions to the Master's report, a decree was entered on February 15, 1927, in favor of the complainant, the Ready & Callaghan Coal Company, for certain amounts found to be due.

That case was before this Court in cause General Number 31436, upon an appeal by the same parties who are here appellants in this proceeding.

The decree referred to was affirmed by this Court upon the failure of the appellants to file their abstract and brief in compliance with the rules of court, and an award of \$300.00 was ordered to be paid to the appellee as damages, in addition to the amount of the original judgment and costs.

On June 15, 1927, after the decree above mentioned was affirmed, the complainant, the Ready & Callaghan Coal Company, made a demand upon the Town of Cicero and its officers for the payment of \$13,030.58, being the total amount then due under the terms of the original decree and the order of this court.

On June 22, 1927, following the above mentioned demand, a petition duly signed and sworn to by the complainant, the Ready & Callaghan Coal Company, was filed, which petition prayed for a rule upon said Joseph Z. Klenha, Peter

in certain special assessments numbered 1085, 1086 and 1087, for other purposes, and for an accounting as to certain matters of repairs made by the complainant. After certain hearings in that cause before the Master in Chancery, and argument before the Court on exceptions to the Master's report, a decree was entered on February 15, 1887, in favor of the complainant, the Neady & Gallagher Coal Company, for certain amounts found to be due.

That case was before this Court in cause General Number 31436, upon an appeal by the same parties who are here complainants in this proceeding.

The decree referred to was affirmed by this Court upon the failure of the appellants to file their abstract and brief in compliance with the rules of court, and an order of \$100.00 was ordered to be paid to the appellee as damages, in addition to the amount of the original judgment and costs.

On June 16, 1887, after the decree above mentioned was affirmed, the complainant, the Neady & Gallagher Coal Company, made a demand upon the Town of Chico and the appellee for the payment of \$12,030.56, being the total amount then due under the terms of the original decree and the order of this court.

On June 22, 1887, following the above mentioned demand, a petition duly signed and sworn to by the complainant, the Neady & Gallagher Coal Company, was filed, which petition prayed for a rule upon said Joseph E. Kinsch, Peter

F. Gieldzinski, and Frank Houscek, President, Treasurer and Clerk, respectively, of the Town of Cicero, to show cause within a reasonable time to be fixed by the Court, why an attachment should not issue against them, and why they should not be punished for contempt of court for their neglect and failure to comply with the said decree.

On July 6, 1927, the respondents to the petition filed a joint and several answer, which was sworn to by each one of them.

On July 14, 1927, there was a hearing on the rule to show cause, based on the petition and the amended answer, and evidence which was introduced. At the hearing the respondents to the rule offered evidence to the effect that the annual appropriation ordinance of the Town of Cicero for the year 1927 was passed January 17, 1927, providing for \$2,000.00 for the payment of judgments. They, also, offered to make proof concerning repairs and rehabilitation of certain streets, and to prove the present condition of those streets. Upon objection by the petitioner, that offer was rejected by the court, on the ground that no notice was shown to have been served upon the petitioner that a certain guaranty had not been complied with.

It was stipulated, at the hearing, that certain Retainer Certificates were unpaid and had not been honored by the Town of Cicero; that the special assessment warrants against which the Retainer Certificates were issued were numbered 1083, 1084 and 1089; that those warrants went regularly into collection each year; that the collections

On July 2, 1957, the respondents to the question
filled a joint and several answer, which was sworn to by
each one of them.

On July 14, 1937, there was a hearing on the rule to show cause, based on the petition and the amended answer, and evidence which was introduced. At the hearing the respondents to the rule offered evidence to the effect that the annual appropriation ordinance of the town of Elmore for the year 1937 was passed January 17, 1937, providing for \$2,000.00 for the payment of judgments. They also offered to make good concerning repairs and rehabilitation of certain streets, and to prove the present condition of those streets. Upon objection by the petitioner, that offer was rejected by the court, on the ground that no notice was shown to have been served upon the petitioner that certain answers had not been amended with

It was stipulated, as the hearing, that certain
retaining certificates were unpaid and had not been honored by
the Town of Alton; that the special assessment warrants
against which the retaining certificates were issued were
numbered 1000, 1001 and 1002; that those warrants were
regularly made collection each year; that the collection

were made by the collector of the Town of Cicero, and that the funds thus collected, in due course, were transmitted by the Collector to the Treasurer of the Town of Cicero.

It was further stipulated that there was a provision in the Charter of the Town of Cicero, reading as follows:

"No money shall be paid out by the Treasurer of said Town unless the same shall have been ordered by the Board, and then only upon a warrant drawn on him by the Clerk, countersigned by the President, specifying what particular fund the same shall be paid out of; and it shall be the duty of the Clerk to keep an account of all such warrants drawn by him."

After the respondents rested their case, the petitioner introduced the entire record returned by the Master, to whom the case was referred for hearing, and upon which record the decree of February 15, 1927, was entered. The testimony contained in that record is not abstracted. It is stated by counsel in their brief for the respondents that it was not material to the issues here involved, with the exception of a certain stipulation.

At the close of the hearing, on July 15, 1927, upon the rule to show cause why the respondents should not be punished for contempt of Court for failing and refusing to pay to the solicitor's for complainant for use of the complainant herein, the sum of money heretofore due under the terms and provisions of the decree heretofore entered in the same cause, the learned Chancellor made the following findings and order: That there is now due and unpaid from the defendant, The Town of Cicero, a municipal corporation,

were made by the collector of the Town of Orleans, and that the funds thus collected, in due course, were transmitted by the collector to the Treasurer of the Town of Orleans.

It was further stipulated that there was a provision in the Charter of the Town of Orleans, reading as follows:

"The money shall be paid out by the Treasurer at such time as the same shall have been ordered by the Board, and then only upon a warrant drawn on him by the Clerk, countersigned by the President specifying what part of the same shall be paid out; and it shall be the duty of the Clerk to keep an account of all such warrants drawn by him."

After the respondents tested their case, the petitioner introduced the entire record retained by the Mayor, to whom the case was referred for hearing, and upon which record the decree of February 14, 1937, was entered. The testimony contained in that record is not contradicted. It is stated by counsel in their brief for the respondents that it was not material to introduce here involved, with the exception of a certain stipulation.

At the close of the hearing, on July 13, 1937, upon the rule to show cause why the respondents should not be punished for contempt of Court for failing and refusing to pay to the collector's tax collector for use of the respondents' money, the sum of money heretofore and under the terms and provisions of the decree heretofore entered in the same cause, the learned Chancellor made the following findings and orders: That there is now due and unpaid from the respondents, the Town of Orleans, a municipal corporation,

to the complainant, the Ready & Callaghan Coal Company, under the decree, the sum of \$13,030.58; that of that amount the sum of \$8,688.21 is due to the complainant on certain Retainer's Certificates of the Board of Local Improvements of the defendant, Town of Cicero, issued in connection with Town of Cicero Special Assessments, County Court Numbers 1083, 1084 and 1089, for work done and materials furnished by the complainant under contract with the Town of Cicero; which Retainer's Certificates are due and unpaid, and which the Town of Cicero,

"by its duly constituted officers and authorities has heretofore wilfully and arbitrarily failed and refused to pay or honor, although all of said special assessments have gone currently into collection each year, and collections made thereon by the collector of the Town of Cicero and the county collector of Cook County, Illinois, respectively, and the funds so collected in due course, transmitted to the treasurer of the Town of Cicero, who now holds the same in trust for the said complainant, to whom in law and equity they should heretofore have been paid by virtue of the terms and provisions of the decree heretofore entered herein.

"that of said above mentioned amount of \$13,030.58, the sum of \$4,342.37 is due to said complainant out of the general funds of said Town of Cicero for the making of repairs to certain streets in said Town of Cicero and for costs, etc.

"that no sufficient cause is shown by the said defendants, Joseph Z. Klenha, Peter F. Gieldzinski and Frank Houcek, President, treasurer and clerk, respectively, of the Town of Cicero, or either of them, why the above mentioned amount of \$8,688.21, should not be paid, or that they have been or are unable to pay the same, but that they, although able so to do, wilfully failed and refused to obey the decree of this Court by paying said sum of money. And the court doth further find and adjudge the said defendants, Joseph Z. Klenha, Peter F. Gieldzinski, and Frank Houcek, president, treasurer and clerk, respectively, of the Town of Cicero, and each of them, to be guilty of contempt of this court, and that said contempt has tended to defeat and impair the rights and interests of the complainant herein and bring the administration of justice into contempt.

under contract with the Town of Orono; which retaining
1933. For work done and materials furnished by the complainant
Special Assessments, County Court Records 1933, 1934 and
and, Town of Orono, issued in connection with Town of Orono
Certificates of the Board of Local Improvements of the delinquent
sum of \$2,500.00 is due to the complainant on certain National Tax
the delinquent, the sum of \$15,000.00; that of that amount the
to the complainant, the Board of Local Improvements, under

by virtue of the terms and provisions of the above
and equity they should have been paid
in trust for the said complainant, so when in law
made of the Town of Dover, who now holds the same
so collected in due course, transmitted to the Town-
of New County, Indiana, respectively, and the Town-
leader of the Town of Dover and the county collector
each year, and collection made thereon by the col-
lector of the Town of Dover and the county collector
has been made as witness, although all of said agree-
ment was made by the said complainant and the Town-
of New County, Indiana, and the Town-
leader of the Town of Dover and the county collector
of the Town of Dover, who now holds the same
so collected in due course, transmitted to the Town-
of New County, Indiana, respectively, and the Town-
leader of the Town of Dover and the county collector
each year, and collection made thereon by the col-
lector of the Town of Dover and the county collector
has been made as witness, although all of said agree-
ment was made by the said complainant and the Town-
of New County, Indiana, and the Town-
leader of the Town of Dover and the county collector

[illegible][illegible]

"It is therefore ordered that the said defendants, Joseph Z. Klenha, Peter F. Gieldzinski and Frank Houscek, president, treasurer and clerk, respectively, of the Town of Cicero, be committed to the common jail of the County of Cook and State of Illinois, and to remain charged with said contempt of this court until they pay the said sum of \$8,688.31 to the solicitors for said complainant for use of said complainant, or into this court for the use of complainant, or until released by due process of law, and that a writ of habeas corpus be issued forthwith directed to the sheriff of Cook County, Illinois, to execute."

The order of the court further found that on January 17, 1927, the Town of Cicero adopted its annual appropriation ordinance, and appropriated \$2,000.00 for the payment of judgments against it; that it voted that the Board of Trustees take all proper steps to pass a tax ordinance, making provisions for the collection of the \$2,000.00 so appropriated, and to appropriate a levy and sufficient tax for the payment of the balance of \$2,342.37 at the next and first opportunity therefor; that the Town of Cicero proceed to finally pay the sum of \$4,342.37 at the earliest possible opportunity.

As stated at the outset, this appeal is from the order and decree of July 15, 1927.

It is contended on behalf of the defendants, that officers of a town cannot be held for contempt, for failing to act upon a decree which is directed against the town alone, without the authority from the corporate body. It will appear, however, that the only remedy of the petitioner when the Town of Cicero, a municipality, refused to obey the decree of the Court, was against its duly elected officers

It is therefore ordered that the said defendant, Joseph S. Brown, Mayor of Chicago, Treasurer and Clerk of the Town of Chicago, be admitted to the common jail of the County of Cook and State of Illinois, and be committed with said defendant at this court until they pay the said sum of \$2,500.00 to the collector for said commitment for use of said commitment, or into this court for the use of commitment, or until released by due process of law, and that a writ of habeas corpus issue forthwith directed to the Sheriff of Cook County, Illinois, to execute.

The order of the court further found that on January 17, 1887, the Town of Chicago adopted its annual appropriation ordinance, and appropriated \$2,500.00 for the payment of judgments against it; that it voted that the Board of Trustees take all proper steps to pay a sum of \$2,500.00 as appropriated, and to appropriate a sum of \$2,500.00 for the payment of the balance of said ordinance, making provision for the collection of said sum at the next and first opportunity thereafter; that the Town of Chicago passed to finally pay the sum of \$4,500.00 at the various possible opportunity.

As stated at the hearing, this appeal is from the order and decree of July 15, 1887.

It is contended on behalf of the defendant, that officers of a town cannot be held for contempt, for failing to do what a decree which is directed against the town alone, without the authority from the corporate body. It will appear, however, that the only remedy of the positioner when the Town of Chicago, a municipality, retards or delays the decree of the Court, was against its duly elected officers

who control and act for it, either by writ of mandamus or by evoking the powers of the court of equity to enforce its own decree; that is, in the original proceedings.

The order appealed from contains two sets of findings. The court finds that \$8,688.21, found under the original decree to be due on the Retainer's Certificates, is in the treasury of the Town, and that these funds should be paid over by the executive officers in accordance with the terms of the decree. It then finds that \$4,342.37 of the original judgment is still to be collected; that \$2,000.00 of that amount had been appropriated to pay judgments, but had not been included in the tax levy, and that the remainder, amounting to \$2,342.37, had neither been appropriated nor included in any tax levy.

It is true that the Ready & Callaghan Coal Company was entitled originally to proceed in assumpsit to recover the \$8,688.21 due on the Retainer's Certificates which had been collected and placed in the treasury; as where funds are already in the treasury, assumpsit is a proper form of action. Conway v. City of Chicago, 237 Ill. 128.

It is urged, however, for the respondents that the petitioner should have proceeded by mandamus, but, considering the nature of the bill and the necessary matters of accounting between the parties that it involved, in our judgment it came properly within the purview of a court of equity; and the court having properly taken jurisdiction and entered the decree, above referred to, it is not now here, to be questioned.

who certified and not for the...
or by evoking the powers of the court of equity to enforce
its own decrees; that is, in the original proceedings.

The order appealed from contains two parts of

findings. The court finds that \$2,500.00, found under
the original decree to be due on the Retainer's Certificate,
is in the treasury of the town, and that these funds should
be paid over by the executive officers in accordance with
the terms of the decree. It then finds that \$2,500.00
of the original judgment is still to be collected; that
\$2,500.00 of that amount had been appropriated to pay
judgments, but had not been included in the tax levy, and
that the year ended, amounting to \$2,500.00, had neither
been appropriated nor included in any tax levy.

It is then that the Nedy & California Coal Company
was entitled originally to proceed in remount to recover
the \$2,500.00 due on the Retainer's Certificate which had
been collected and placed in the treasury, as where funds
are already in the treasury, remount is in a proper form
of action. Remount v. Nedy & California Coal Co., 227 Ill. 132.

It is urged, however, for the respondents that
the petition should have proceeded by mandamus, but, con-
sidering the nature of the bill and the necessary nature
of accounting between the parties that it involved, in our
judgment it was properly within the jurisdiction of a court of
equity; and the court having properly taken jurisdiction and
entered the decree, decree referred to, it is not now open
to be questioned.

The record shows that at the time of the filing of the petition by the Ready & Callaghan Coal Company, that company already had a judgment outstanding and unpaid, and in full force and effect, and which was entered by a court of equity, which has, inherently, the power to enforce its own judgments.

In the case of Board of Commissioners of Knox Co. v. Aspinwall, et al. 24 How. 376, the court said:

"But no Court, having proper jurisdiction and process to compel the satisfaction of its own judgment, can be justified in turning its suitors over to another tribunal to obtain justice."

It is urged for the respondents that the proper remedy for the complainant was by mandamus against the Board of Trustees; the answer to that is, that, having already properly resorted to a court of chancery and the court having taken jurisdiction and undertaken to adjust and enforce his rights, mandamus would not lie. Mandamus lies where a litigant has a legal right, and has no other remedy. The People, ex rel v. City of Chicago, 53 Ill. 424. Assumpsit, therefore was unnecessary, as the complainant already had a decree, and mandamus would have been improper because the court already had jurisdiction to enforce the collection.

It is contended for the respondents that as it is provided in the charter of the Town of Cicero that:

The record shows that at the time of the filing of the petition by the Ready & California Coal Company, that company already had a judgment outstanding and unpaid, and in full force and effect, and which was entered by a court of equity, which has, inherently, the power to enforce its judgments.

In the case of Board of Commissioners of Knox Co. v. [redacted], 24 How. 375, the court said:

"But no court, having proper jurisdiction and process to compel the satisfaction of its judgments, can be justified in turning its back over to another tribunal to obtain satisfaction."

It is urged for the respondents that the proper remedy for the complainant was by mandamus against the Board of Trustees; the answer to that is, that, having already properly resorted to a court of equity and the court having taken jurisdiction and undertaken to adjust and enforce his rights, mandamus would not lie. Mandamus lies only where a right is a legal right, and not an equitable one. The court in the case of [redacted], 104 U.S. 454, 455, says: "Mandamus was unnecessary, as the complainant already had a remedy, and mandamus would have been improper because the court already had jurisdiction to enforce the collection."

It is contended for the respondents that as it is provided in the charter of the Town of [redacted]:

"No money shall be paid out by the Treasurer of said Town unless the same shall have been ordered by the Board and then only upon a warrant drawn on him by the clerk, countersigned by the President, specifying what particular fund the same shall be paid out of; and it shall be the duty of the clerk to keep an account of all such warrants drawn by him."

the petition for the rule did not show that any steps were ever taken by the complainant to bring the Board of Trustees within the jurisdiction of the Court, although the answer filed to the rule pleads the above provision of the Town Charter. But the decree, necessarily, transcends the above provision.

The decree found that the complainant had fully performed the contract on its part, and that it was entitled to payment in full, and the decree then ordered the Town of Cicero to pay the sums that were found to be due. In Commonwealth v. Taylor, et al, 36 Pa St. 363, the court said,

"In the matter of disputed debts, the final responsibility belongs to this court, not to you. Your official duty is ascertained by us, and then obedience alone is your duty. * * * The judgments of the law declare the duties, not the wishes, of the parties. If cities and counties may resist the final judgments of the Court, then brute force is substituted for law, and the individual citizen submits, not from respect for ordained authorities, but because he cannot muster force enough to conquer the forces of the State; and then, also, mere local organizations, created by the State, cities or counties, become more powerful than the State itself, and your houses and property and other rights are preserved and enforced, not because your government is respected, but because it is the greatest combination of force, and none other dare resist."

From what the record shows, there was nothing left for the respondents to do but pay over the money called for by the certificates, which money, according to the decree, was already in the treasury. Counsel for the respondents have cited Hughson, et al v. People of the State of Illinois, 91 Ill. App. 396; Knight v. Village of Thompsonville, 74 Ill. 550, but, in our judgment, neither of those cases is in point.

It is urged for the respondents that no payment of a claim or judgment can be made by a municipal corporation unless an appropriation has been made previously for its payment. When, however, the Town of Cicero passed the Improvement Ordinances, secured the confirmation of the special assessments in Court, entered into the contracts in question with the petitioner, and then issued to it the Retainer Certificates in question, the particular funds when collected had the same quality as those in Schwartz v. City of Chicago, 223 Ill. App. 184, and were appropriated funds, no further act of appropriation being necessary; and if the Town of Cicero had taken those funds and used them for any other purpose than to pay for the improvements for which they were levied and collected, the law would treat that which was so expended as still in the hands of the Town and available for payment due the contractor on his contract. Shade v. City of Taylorville, 213 Ill. App. 512. Money collected by a special assessment is a trust fund to pay for a particular improvement, and the municipality has no right to use such funds for any other purpose. Conway v. City of

That what the respondent there was making
 left for the respondents to do but pay over the money
 called for by the certificate, which money, according
 to the record, was already in the treasury. Counsel for
 the respondents have cited Hudson et al v. People of the
State of Illinois, 21 Ill. App. 583; Hall v. Village of
Thornhill, 74 Ill. 580, but, in our judgment, neither
 of these cases is in point.

It is urged for the respondents that no payment
 of a claim or judgment can be made by a municipal corpo-
 ration unless an appropriation has been made previously for
 its payment. When, however, the town of Glendale passed the
 improvement ordinance, secured the certification of the
 special assessors in Glendale, entered into the contracts
 in question with the petitioners, and then issued to it
 the Notice Certificates in question, the petitioners' funds
 when collected had the same quality as those in Rehman
v. City of Chicago, 323 Ill. App. 184, and were appropriated
 funds, no further act of appropriation being necessary;
 and if the town of Glendale had taken these funds and used them
 for any other purpose than to pay for the improvements for
 which they were levied and collected, the law would treat
 that which was so expended as still in the hands of the town
 and available for payment due the contractor on his contract,
Rehman v. City of Chicago, 323 Ill. App. 185. Money
 collected by a special assessment is a trust fund to pay for
 a particular improvement, and the municipality has no right
 to use such funds for any other purpose. Conroy v. City of

Chicago, 237 Ill.128.

In our judgment, Joseph E. Klenha, Peter E. Gieldzinski and Frank Houscek, president, treasurer and clerk, respectively, were the proper officers to pay over the money due on the Retainer Certificates and the decree was sufficient authority to justify their doing so; and as it is admitted that the funds were in the treasury and the officers in question have introduced no competent or sufficient evidence to show why they refused or failed to pay it over, the Chancellor was entirely justified in holding that their refusal was wilfull, and that their conduct was contumacious.

For the reasons stated, the decree will be affirmed.

AFFIRMED.

HOLDOM AND WILSON, JJ. CONCUR.

in our judgment, January 2, 1914, Peter J. McElintock and Frank Honan, president, treasurer and clerk, respectively, were the proper officers to pay over the money due on the National Fertilizer and the other two National contracts to their respective banks; and it is admitted that on June 10, 1914, the officers in question have introduced no competent or sufficient evidence to show why they refused or failed to pay it over, the Commission was duly justified in holding that their refusal was wrongful.

100-443887-100

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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* 100-443624-111 BOEING CO & BOEING

WESTERN & SOUTHERN LIFE INSURANCE
COMPANY, a corporation,

Appellant,

v.

GEORGE R. BAIR,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On January 3, 1927, the Western & Southern Life Insurance Company, a corporation, as plaintiff, filed a statement of claim in the Municipal Court against George R. Bair, as defendant, alleging that the defendant collected, while agent of the plaintiff company, from policyholders of the plaintiff, between July 26 and August 7, 1926, the sum of \$158.06, and failed to account therefor. The statement of claim purports to name the number of the policies, the names of the persons from whom the amounts were collected, and the date of collection. They are as follows:

| <u>Policy No.</u> | <u>Name</u> | <u>Amount
Collected</u> | <u>Date of Coll.</u> |
|-------------------|--------------------|-----------------------------|----------------------|
| 240843 | Lena Bringsmann | \$40.87 | July 26th, 1926 |
| 88358 | Frieda Bauer | 10.66 | Aug. 7th, 1926 |
| 180445 | Joseph Kovar | 8.00 | June 7th, 1926 |
| 180445 | Joseph Kovar | 35.25 | July 1926 |
| 158924 | Francois Lukan | 10.89 | Aug. 4th, 1926 |
| 280386 | Fred Mittelmeyer | 7.92 | Aug. 27th, 1926 |
| 191046 | Nada Prezel | 5.36 | Aug. 26th, 1926 |
| 145164 | Virginia Schaeffer | 10.80 | Sept. 7th, 1926 |
| 235213 | Anton Jurschitz | 18.74 | Aug. 7th, 1926 |
| 238604 | James Casey | 9.37 | |

WESTERN & SOUTHERN LIFE INSURANCE COMPANY, a corporation

Applicant

APPEAL FROM

UNIVERSITY COURT

OF CHICAGO

Appellee

Opinion filed March 29, 1938.

MR. JUSTICE TAYLOR delivered the

opinion of the court.

On January 2, 1937, the Western & Southern

Life Insurance Company, a corporation, as plaintiff,

filed a statement of claim in the Municipal Court against

George H. Blair, as defendant, alleging that the defendant

collected, while agent of the plaintiff company, from

policyholders of the plaintiff, between July 28 and August

7, 1936, the sum of \$185.00, and failed to account therefor.

The statement of claim purports to show the number of the

policy, the names of the persons from whom the amounts

were collected, and the date of collection. They are as

follows:

| Amount Collected | Date of Coll. | Name |
|------------------|---------------|---------------|
| \$40.07 | July 28, 1936 | John G. Gandy |
| 10.00 | Aug. 7, 1936 | John G. Gandy |
| 2.00 | June 7, 1936 | John G. Gandy |
| 32.00 | July 28, 1936 | John G. Gandy |
| 10.00 | Aug. 4, 1936 | John G. Gandy |
| 7.00 | Aug. 27, 1936 | John G. Gandy |
| 1.00 | Aug. 28, 1936 | John G. Gandy |
| 10.00 | Sept. 7, 1936 | John G. Gandy |
| 18.74 | Aug. 7, 1936 | John G. Gandy |
| 2.77 | | John G. Gandy |

The statement of claim alleged further that it was for money had and received amounting to \$158.06, and for money found to be due from the defendant to the plaintiff on or about October 18, 1926, "on an account stated between them, together with interest thereon." An affidavit of claim in the sum of \$158.06, was attached to the statement of claim. On February 18, 1927, the defendant filed an affidavit of merits, which contained the following:

"This defendant admits that he received the amounts of money as shown in plaintiff's statement of claim, amounting to \$158.06.

"This defendant further says that at the time said money was received, he was acting as an insurance solicitor for the plaintiff; that he has fully accounted for and turned over the aforesaid sums of money to one E. E. Eastwood, the Superintendent of the plaintiff company, excepting the sum of \$35.25, collected from one Joseph Kovar, and that said sum of \$35.25 was accounted for to William Beck, an Assistant Superintendent of the plaintiff company; that said accounting was had and made with the said company prior to the time this defendant left the employ of the plaintiff company;

"WHEREFORE, this defendant says that he is not indebted to the plaintiff in the sum of \$158.06 or any other sum or sums whatsoever."

On February 24, 1927, there was a trial before the court with a jury, and a verdict finding the issues against the plaintiff.

On March 19, 1927, on motion of the plaintiff, a new trial was granted.

On March 28, 1927, the plaintiff filed an amended statement of claim, which qualified the prior statement of claim of January 3, 1927, by alleging that the claim was for money found to be due from the defendant to the plaintiff

The statement of claim alleged further that it was not money but was received amounting to \$150.00, and for money found to be due from the defendant to the plaintiff on or about October 10, 1907, "wherein account stated between them, together with interest thereon." An affidavit of claim in the sum of \$150.00, was attached to the statement of claim. On February 10, 1907, the defendant filed an affidavit of denial, which contained the following:

"This defendant admits that he received the amount of money as shown in plaintiff's statement of claim, amounting to \$150.00. This defendant further says that at the time said money was received, he was acting as an insurance collector for the plaintiff; that he has fully accounted for and turned over the above said sum of money to one E. L. Langford, the superintendent of the plaintiff's company, excepting the sum of \$25.00, collected from one Joseph Lewis, and that said sum of \$25.00 was accounted for to William Reed, an Assistant Superintendent of the plaintiff's company; that said accounting was had and made with the said company prior to the time this defendant left the employ of the plaintiff's company; WHEREFORE, this defendant says that he is not indebted to the plaintiff in the sum of \$150.00 or any other sum or sums whatsoever."

On February 25, 1907, there was a trial before the court with a jury, and a verdict finding the issues against the plaintiff.

At March 10, 1907, an appeal of the plaintiff was taken to the Circuit Court of the United States for the District of Columbia, and the plaintiff filed an amended statement of claim of January 2, 1907, by alleging that the claim was for money found to be due from the defendant to the plaintiff

"on or about September 18, 1926, at which time the defendant stated that he was short in his accounts with the company, that an account was then and there stated between them, amounting to \$158.06, together with interest thereon at 5% per annum from said date to the date of judgment."

On April 15, 1927, the defendant filed an amended affidavit of merits in which he admitted that he acted as agent and collected the \$158.06, but denied that he failed to account for it, and denied that anything was due the plaintiff, and denied that on October 18, 1926, or at any other time he stated that he was short in his accounts, and denied that there was an account stated between them amounting to \$158.06.

On motion of the plaintiff, that amended affidavit of merits was stricken, and on April 21, 1927, the defendant filed a further affidavit of merits. In that, he admitted receipt of the \$158.06, and further alleged that "he had fully accounted for and turned over the aforesaid sums of money to one E. E. Eastwood, the Superintendent of the plaintiff company, excepting the sum of \$35.25 collected from one Joseph Kovar", and that that sum was accounted for to William Beck, an Assistant Superintendent of the plaintiff; "that said accounting was had and made with the said company prior to the time" he left the employment of the plaintiff company.

On April 28, 1927, the defendant filed a further affidavit of merits. In that he alleged the following:

"that he was employed as an insurance solicitor for plaintiff; that as such he collected the various sums of money set forth in plaintiff's

on or about September 19, 1937, at which time the defendant stated that he was short in his accounts with the company, that an account was then and there stated between them, amounting to \$155.00, together with interest thereon at 6% per annum from said date to the date of judgment.

On April 15, 1937, the defendant filed an amended affidavit of merits in which he admitted that he acted as agent and collected the \$155.00, but denied that he failed to account for it, and denied that anything was due the plaintiff, and denied that on October 18, 1936, or at any other time he stated that he was short in his accounts, and denied that there was an account stated between him and the plaintiff.

In motion of the plaintiff, that amended affidavit of merits was withdrawn, and on April 21, 1937, the defendant filed a further affidavit of merits. In that, he admitted knowledge of the \$155.00, and further alleged that he had fully accounted for and turned over the aforesaid sum of money to one L. E. Greenwood, the Superintendent of the plaintiff company, expending the sum of \$55.00 collected from one Joseph Henry, and that that sum was accounted for to William Mack, an Assistant Superintendent of the plaintiff company. Said accounting was had and made with the said company prior to the time he left the employment of the plaintiff company.

On April 22, 1937, the defendant filed a further affidavit of merits. In that he alleged the following:

That he was employed as an Insurance collector for plaintiff; that as such he collected the various sums of money set forth in plaintiff's

statement of claim, amounting to \$158.06, of which sum this affiant paid over in cash to the plaintiff the sum of \$52.10; that salary due this affiant at rate of \$16.00 per week for seven weeks, amounting in all to the sum of \$112.00 was retained by the plaintiff and applied to the payment of said sums of money; that in addition to said sums, there was due this affiant at the time he was discharged by plaintiff the further sum of \$22.00 for special salary and commissions amounting to approximately the sum of \$200.00, which latter sums the plaintiff claims to have been forfeited by this affiant. Therefore, affiant states that each and all of said sums of money have been fully accounted for by this affiant, and fully paid to the plaintiff and that he is not indebted to plaintiff in any sum whatsoever, but that plaintiff is indebted to this affiant in sums, the exact amount of which is at present unknown to affiant."

On May 4, 1927, the defendant filed a further amended affidavit of merits. In that he denied that he had collected money amounting to \$158.06, while agent of the plaintiff, which he had failed to account for, and, after alleging the amount he had collected and the amount he had paid over in cash, and the matters concerning his salary, that there was due him approximately the sum of \$200.00. He then denied that there was any money found to be due from him to the plaintiff on or about October 18, 1926, on an account then and there stated between them, and alleged that all sums of money collected by him as an agent had been fully accounted for and fully paid, and that he was not indebted to the plaintiff in any sum whatever, but that the plaintiff was indebted to him, the exact amount of which was unknown to him.

On May 5, 1927, the plaintiff was given leave to amend the statement of claim on its face by changing

statement of claim, amounting to \$125.00, of which sum this claimant paid over in cash to the plaintiff the sum of \$25.00; that said sum of \$125.00 was retained by the plaintiff and applied to the payment of said sum of money; that in addition to said sum, there was also paid to the plaintiff at the time he was discharged by plaintiff the further sum of \$25.00 for special salary and cost of claim amounting to approximately the sum of \$500.00, which latter sum the plaintiff claims to have been forfeited by this claimant. Moreover, claimant stated that he and all of said sum of money have been fully accounted for by this claimant, and that he is to the plaintiff and that he is not indebted to the plaintiff in any sum whatsoever, but that the plaintiff is indebted to this claimant in sum of the exact amount of which is at present unknown to claimant.

On May 4, 1937, the defendant filed a further amended affidavit of service. In that he stated that he had collected money amounting to \$125.00, while agent of the plaintiff, which he had failed to account for, and after alleging the amount he had collected and the amount he had paid over in cash, and the entries concerning his salary, that there was due him approximately the sum of \$500.00. He then denied that there was any money found to be due from him to the plaintiff on or about October 15, 1936, on account then and there stated between them, and alleged that all sums of money collected by him as an agent had been fully accounted for and fully paid, and that he was not indebted to the plaintiff in any sum whatsoever, but that the plaintiff was indebted to him, the exact amount of which was unknown to him.

On May 7, 1937, the plaintiff was given leave to amend the statement of claim on the face by changing

the date of October 18, 1926 to September 18, 1926.

There was a trial before the court, with a jury, and on May 6, 1927, a verdict finding the issues against the plaintiff. Motions for a new trial and in arrest of judgment on behalf of the plaintiff were overruled, and on May 8, 1927, judgment was entered on the verdict. This appeal is from that judgment.

We have set forth the pleadings, in extenso, because to us, the changes in the position of the defendant appear to be of considerable significance. There have been two trials of the case, and we are loath therefore to do otherwise than affirm the judgment. However, in the view we take of the case as it appears here, we are convinced that the present judgment ought not to stand.

It is admitted by the defendant that he collected the particular amounts, totaling \$158.06; and as his counsel stated in his opening address to the jury, the only question is, did he account for it?

It will be observed from the above recitation of the pleadings that in his fourth amended affidavit of merits he set up, and for the first time, that the plaintiff, in reality, was indebted to him; owed him \$32.00 for salary and commissions, amounting to \$200.00.

For the plaintiff, five witnesses testified, and for the defendant, himself, alone. At the trial, as it was admitted by the defendant, in his pleadings that he had collected the \$158.06, claimed by the plaintiff, it was assumed that the plaintiff had made out a prima facie case;

the date of October 18, 1936 to September 18, 1936.

There was a trial before the court, with

a jury, and on May 8, 1937, a verdict finding the issue

against the plaintiff. Motion for a new trial and in error

of judgment on behalf of the plaintiff were overruled, and

on May 8, 1937, judgment was entered on the verdict. This

appeal is from that judgment.

We have not taken the plaintiff's in extension

because to us, the changes in the position of the defendant
appear to be of considerable significance. There have been

two trials of the case, and we are loath therefore to do

otherwise than affirm the judgment. However, in the view

we take of the case as it appears here, we are convinced

that the present judgment ought not to stand.

It is admitted by the defendant that he collected

the plaintiff's accounts, totaling \$150.00; and as his counsel

stated in his opening address to the jury, the only question

was, did he account for it?

It will be observed from the above recitation of

the proceedings that in his fourth amended affidavit of

he swore he set up, and for the first time, that the plaintiff's

in reality, was indebted to him; each him \$25.00 for salary

and maintenance, amounting to \$250.00.

For the plaintiff, five witnesses testified, and

for the defendant, himself, alone. At the trial, as it was

admitted by the defendant, in his pleading that he had

collected the \$150.00, claimed by the plaintiff, it was

assumed that the plaintiff had made out a living loan case;

and that the burden therefore fell on the defendant to begin, and introduce evidence in support of his alleged defense.

The evidence for the defendant is that he paid all the amounts sued for, and that the plaintiff owed him certain amounts for back salary. On the other hand, there is the evidence of Eastwood, the superintendent; Heck, assistant superintendent; Michaelis, an employee, and that of Edna Krause, cashier, together with a series of exhibits signed by the defendant, and the suspicious claim for salary made for the first time in the defendant's fourth affidavit of merits, which seem quite overwhelmingly to controvert the plaintiff's claim, and to prove that the verdict is clearly against the weight of the evidence. We shall not recite the evidence in detail as there must be a new trial. We have examined it carefully, however, and are unable to conclude that the verdict should be allowed to stand. We are not convinced that the evidence of the plaintiff's four witnesses - taken with its corroboration by other circumstances, such as the exhibits and the pleadings - is proved to be untrue merely by the statements of the defendant as they appear in the record. What led the jury to the conclusion it reached, we do not know, but we cannot believe that it was anything in the way in which the witnesses appeared and gave their evidence, which might bear on the question of their credibility. The evidence in the record here is so one-sided we feel bound to override the verdict.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HOLDOM AND WILSON, JJ. CONCUR.

at Washington and no list appears to indicate all that has
happened in the progress of some of the work has, indeed,

The evidence for the defendant is that he sold all the amounts used for, and that the plaintiff owed him certain amounts for such salary. On the other hand, there is the evidence of defendant, the superintendant, book, consistent superintendant, Michaelis, an employee, and that of John Krasner, cashier, together with a series of exhibits signed by the defendant, and the unaltered claim for salary made for the first time in the defendant's fourth affidavit of verity, which now raises overwhelmingly no controversy the plaintiff's claim, and to prove that the verities is clearly against the weight of the evidence, we shall not receive the evidence in detail as there must be a new trial. We have examined it carefully, however, and are unable to conclude that the verities should be allowed to stand. We are not convinced that the evidence of the plaintiff's four witnesses - taken with the corroboration by other circumstances, such as the exhibits and the pleadings - is proved to be untrue merely by the statements of the defendant as they appear in the record. That is the jury to the conclusion is reached, we do not know, but we cannot believe that it was anything in the way in which the witnesses appeared and gave their evidence, which might bear on the question of their credibility. The evidence in the record here is so uncontradicted as to be bound to override the verities. The judgment will be reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE

AND WITH THE COURT

THE PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. KATHERINE A. PATTERSON,

Appellees,

vs.

THOMAS J. GREGGON, ET AL.,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 4, 1925, in the case of The People of the State of Illinois, ex rel. Katherine A. Patterson, a petition for a writ of mandamus was filed in the Superior Court to compel the respondents, members of the Retirement Board of Cook County - pursuant to an act to provide for the creation and administration of a County Employees' Annuity and Benefit fund (Law of Ill. 1925, p. 266) - to issue forthwith to the relator, Patterson, a "certificate of prior service" as a "present employee," as described and defined in the above mentioned act, and to cause to be paid to her certain annuity payments which she claims have rightfully accrued and are due to her from the County Employees' Annuity and Benefit Fund of Cook County.

The respondents, who composed the Retirement Board, filed a plea. The petitioner demurred to the plea, and, upon a hearing, the demurrer was sustained; and the respondents electing to stand and abide by their plea, the court,

40. A. 1842

Opinion filed March 28, 1988.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

after hearing arguments of counsel, ordered that the writ issue. This appeal is from that order.

The petitioner, fifty-seven years of age, was employed in the office of the Recorder of Deeds of Cook County, as a folio writer and comparer, from July 5, 1888, to April 1, 1925. From the latter date to May 15, 1925, she was on leave of absence, and from May 15 to July 1, 1925, she was employed as a clerk in the office of the Board of Assessors of Cook County. From the latter date to December 15, 1925, she was granted a leave of absence from her employment by Cook County, and on the latter date was reemployed in the office of the State's Attorney of Cook County in the Social Service Department, at a monthly salary of \$170.00.

In her petition she alleges that her employment continued uninterruptedly from December 15, 1925 to May 1, 1926; that on the latter date she resigned from the service of Cook County; that she had been in the employ of the County of Cook for an aggregate period of approximately thirty-seven years; that in all that time her name was upon the payroll of said Cook County; that on October 10, 1925 she filed with the Retirement Board her application for participation in the Benefit Fund of Cook County; that there has been deducted from her salary by the proper officer of the County of Cook such sums of money as are prescribed by the Act, from January 1, 1926, when the Act came into actual operation; that her application for participation in the Benefit Fund was denied by the Retirement Board on May 20, 1926; that the Retirement

heard unjustly and unlawfully refused to grant her as a "present employee" as defined in the act, a certificate showing the entire period of service rendered by her prior to January 1, 1928, and the amount to her credit as of such day for prior service annuity, called a certificate for prior service; that according to the record, she was entitled to the payment of an annuity for life; that payment to be of an amount in accordance with the provisions of the act, and to ^{be} paid in accordance therewith.

It is stated in the plea of the respondents (and admitted by the petitioner's demurrer) that on December 15, 1925, the relator was completely and permanently separated from the employment of Cook County; that prior to December 15, 1925, she was in the employment of Cook County in the positions and for the periods alleged in her petition, and on that day was entitled to all the equitable rights or considerations such prior employment gave her, if any, in securing compliance with the conditions of the Benefit Fund Act of 1925, in order to become a participant in the fund created by that act; that on December 15, 1925, she and the "employing authority of the County of Cook for the position hereinafter named, for the sole purpose and intention of making the petitioner an employe of Cook County, on the 31st day of December, A. D. 1925, in order to enable her to comply with the conditions of said act, and become a member or participant in said fund, entered into a temporary contract of employment by which petitioner became the employe of said County of Cook from and including, to-wit, December 15, A. D. 1925, to and including the 30th day of

April, A. D. 1926, during which period of time the petitioner performed services for Cook County in the position of Social Service in the office of the State's Attorney of Cook County at a salary of \$170.00 a month; that said last named contract and the employment thereunder would not have been entered into or performed except for the purpose aforesaid."

It is the claim of the relator that she had the right to reenter the County service, and the County authorities had the right to employ her for the purpose and intention of making her an employee of the County on December 31, 1925, in order to enable her to comply with the conditions of the act, and become a member and share in the funds; and, on the other hand, it is the contention of the respondents that such temporary employment for the purpose stated, was in violation of the spirit of the act, and, therefore, did not make the relator an employee of the County under the act, and did not entitle her to participate in the pensions provided by the act.

It must be taken as admitted that the relator was in the employment of the County on December 15, 1925, and continued in such employment up to and including April 30, 1926, as a clerk in the office of the State's Attorney of Cook County. Section 12 of the act defines "present employee" as follows: "Any employee who shall be in the employ of such county on the 31st day in the month of December of the year in which this act shall come in force and effect in such county." The relator, therefore, was, according to the requirements of the act, a "present employee" on December 31, 1925; and between December 15,

[illegible]

1925 and May 1, 1926, was employed in the Social Service Department of Cook County and rendered services throughout that period at a monthly salary of \$170.00. There was a contract for service and a carrying out of that contract on both sides, so that it would seem difficult to hold - even if "for the sole purpose and intention of making the petitioner an employee of Cook County on the first day of December, A. D. 1925, in order to enable her to comply with the conditions of said act and become a member or participant in said fund," the relator and the employing authority of Cook County entered into a temporary contract of employment by which the relator became an employee of Cook County on December 15, 1925, to and including April 30, 1926 - that the purpose of either the relator or the employing authority, or both, could be considered as in any way in derogation of the employment, so as to prevent the relator from showing and proving that she had fully complied with the requirements of the act.

As we have said, there was a contract for services, fully executed on both sides. As far as the respondents were concerned, that was complete evidence of a compliance with the act, and a justification to issue the certificate of prior service to the relator as a "present employee" under the act, and to pay her the annuity payments due thereunder. The County having obtained a full quid pro quo, services rendered from December 15, 1925 on, concerning which services no complaint is made, and which, therefore, are presumed to

have been satisfactory, and rendered in full, it is of no moment to the respondents what the motives or the contracting parties were on December 15. If, on the other hand, the evidence showed that the services were not rendered, then the employment would be tainted with fraud, and constitute a good defense on the part of the respondents.

Further, it is admitted that there was deducted from her salary, which accrued between December 15, 1925, and May 1, 1926, such sums of money as are prescribed by the Act for the Benefit Fund, and that was evidence that she was regularly employed, and estops the respondents.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

RECORDED AND INDEXED, 23. MAR. 28.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN EDWARD MOHREN,

Appellee,

v.

THOMAS L. GREGSON, et al,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On December 24, 1926, in the name of the People
of the State of Illinois, ex rel John Edward Mohren, a
petition for a writ of mandamus was filed in the Superior
Court to compel the respondents, members of the Retirement
Board of Cook County - pursuant to an act to provide for
the creation and administration of a county employees' annuity
and benefit fund (Laws of Ill. 1925, p. 266) - to issue forth-
with to the relator, Mohren, a "certificate of prior service"
as a present employee," as described and defined in the
above mentioned act, and to cause to be paid to her certain
annuity payments which she claims have rightfully accrued
and are due to her from the County Employees' Annuity and
Benefit Fund of Cook County.

The respondents on January 28, 1927, filed a plea,
setting up, substantially, the following; that the relator
was on December 15, 1925, completely and permanently separated
from employment by Cook County; that prior to that time he

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel JOHN EDWARD HORTON,

Appellee,

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

THOMAS L. GREGORY, et al.,

Appellants.

Opinion filed March 28, 1928.

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On December 24, 1926, in the name of the People

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Board of Cook County - pursuant to an act to provide for

the creation and administration of a county employees' annuity

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as a present employee, as described and defined in the

above mentioned act, and to cause to be paid to her certain

annuity payments which she claims have rightfully accrued

and are due to her from the County Employees' Annuity and

Benefit Fund of Cook County.

The respondents on January 29, 1927, filed a plea,

setting up, substantially, the following: that the relator

was on December 15, 1926, completely and permanently separated

from employment by Cook County; that prior to that time she

was in the employment of Cook County, as alleged in his petition, and on December 15, 1925, was entitled to all the rights such prior employment gave him, if any, in securing compliance with the benefit fund Act, approved July 2, 1925, in order to become a participant in the fund created by that act; that thereafter, on December 15, 1925, he and the employing authority of Cook County, for the sole purpose and intention of making the petitioner an employe of Cook County on December 31, 1925, in order to enable him to comply with the Act and become a member or participant in the benefit fund, entered into a temporary contract of employment, by which he, the relator, became an employee of Cook County from and including December 15, 1925 to and including January 15, 1926, during which period of time the relator performed services for Cook County in a position in the Superior Court at a salary of \$183.00 a month.

On February 15, 1927, the petitioner filed a replication, in which it was alleged, among other things, that, on December 15, 1925, the relator was not completely and permanently separated from the employment by Cook County; that he did not, on December 15, 1925, start to work again for the sole purpose of becoming a participant in the fund created by the Act; that he did not, on December 15, 1925, together with the employing authority of the County of Cook, enter into a temporary contract of employment for the sole purpose and intention of making him, the relator, an employe of Cook County on December 15, 1925, in order to enable him to comply with the conditions of the Act and become a participant in said

was in the employment of Cook County, as alleged in his petition, and on December 15, 1935, was entitled to all the rights such prior employment gave him, if any, in securing compliance with the benefit fund act, approved July 5, 1935, in order to become a participant in the fund created by that act; that thereafter, on December 15, 1935, he and the employing authority of Cook County, for the sole purpose and intention of making the petitioner an employee of Cook County on December 15, 1935, in order to enable him to comply with the act and become a member or participant in the benefit fund, entered into a temporary contract of employment, by which he, the petitioner, became an employee of Cook County from and including December 15, 1935 to and including January 15, 1936, during which period of time the petitioner performed services for Cook County in a position in the Superior Court of a salary of \$11,000 a year.

On February 15, 1937, the petitioner filed a registration, in which it was alleged, among other things, that, on December 15, 1935, the petitioner was not employed and permanently separated from the employment by Cook County; that he did not, on December 15, 1935, start to work again for the sole purpose of becoming a participant in the fund created by the act; that he did not, on December 15, 1935, together with the employing authority of the County of Cook, enter into a temporary contract of employment for the sole purpose and intention of making him, the petitioner, an employee of Cook County in order to enable him to comply with the conditions of the act and become a participant in said

fund; that the services were performed as alleged by him in the petition; that he was on sick leave and returned to work, all as set forth in his petition.

On March 28, 1927, the respondents filed three further pleas, in which they set up (1) that the relator filed his application for participation in the benefit fund on December 14, 1925, on which day, it is alleged, that the relator was not an employee of the County of Cook; (2) that the relator was not and is not a "present employee" of the County of Cook, within the meaning of the Act; and (3) that the relator filed his application for participation in the fund on December 14, on which day he was not a "present employee" of Cook County, under the Act.

On April 1, 1927, the petitioner filed a replication, denying the allegations set up in the just mentioned pleas.

There was a trial before the court without a jury, and a judgment entered that a writ issue, commanding the respondents, members of the Retirement Board of the County Employees' Annuity and Benefit Fund of Cook County, to issue forthwith to John Edward Mohren (the relator) a "certificate of prior service" as a "present employee," as defined in the Act, and to approve the application of the relator for participation in the Benefit Fund, for annuity payments which had rightfully and lawfully accrued and were due to the relator, and that the "respondents perform all formal acts necessary to effect the same." This appeal is from that order.

The petitioner was sixty-nine years of age at the time of the commencement of these proceedings, and had worked

land; that the services were performed as alleged by him in the petition; that he was on sick leave and returned to work, all as set forth in his petition.

On March 26, 1937, the respondents filed three further pleas, in which they set up (1) that the petitioner filed his application for pension in the month of

March on December 14, 1935, on which day, it is alleged,

that the petitioner was not an employee of the County at that

(2) that the petitioner was not and is not a "present employee"

of the County at that time, within the meaning of the Act; and

(3) that the petitioner filed his application for pension

in the month of December 14, on which day he was not a "present

employee" of Cook County, under the Act.

On April 1, 1937, the petitioner filed a reply-

tion, denying the allegations set up in the just mentioned pleas.

There was a trial before the court without a jury,

and a judgment entered that a writ issue, commanding the

respondents, members of the Retirement Board of the County

Employees' Annuity and Benefit Fund of Cook County, to issue

to the petitioner (the petitioner) a "certificate

of prior service" as a "present employee," as defined in the

Act, and to approve the application of the petitioner for pen-

sion in the Benefit Fund, for annuity payments which

had rightfully and lawfully accrued and were due to the

petitioner, and that the respondents perform all formal acts

necessary to effect the same. This appeal is from that order.

The petitioner was sixty-nine years of age at the

time of the commencement of these proceedings, and had worked

in various offices of Cook County, those of the County Treasurer, County Clerk, Recorder's Office, Circuit Court and Superior Court Clerk's offices, for upwards of twenty-five years. From July 30, 1925, to December 15, 1925, as an employee in the office of the Clerk of the Superior Court, he was on leave of absence.

The relator testified that on July 1, 1925, he went on his vacation; that prior to going, he had a talk with Erickson, the Clerk of the Superior Court, under whom he was working, in which he told Erickson that he was not well; that Erickson said if at the end of his two weeks vacation he did not feel well that he should stay until he got well; that he returned to his employment on December 14, 1925, and at that time started to work and continued his work until January 15, 1926; that for his work he was paid from December 14, 1925 to January 15, 1926; that he was paid a salary at the rate of \$180.00 a month.

On cross-examination, he testified that the request he made in July, 1925, was the first one he had ever made for leave of absence on account of sickness; that he was on vacation two weeks with pay; that at the end of two weeks his pay stopped and then his leave of absence commenced, without pay; that it was the first leave of absence he ever had in his service of the county, and that it was owing to his illness; that he was not a civil service employe, and never had been.

Counsel for the respondents admitted the service up to the last period beginning December 15th and ending January 15th and that he was on the payroll and drew a salary

in various offices of Cook County, those of the County Treasurer, County Clerk, Recorder's Office, Circuit Court and Superior Court Clerk's Office, for upwards of twenty-five years. From July 30, 1925, to December 15, 1925, as an employee in the office of the Clerk of the Superior Court, he was on leave of absence.

The witness testified that on July 1, 1926, he went on his vacation; that prior to going, he had a talk with Erickson, the Clerk of the Superior Court, under whom he was working, in which he told Erickson that he was not well; that Erickson said it at the end of his two weeks vacation he did not feel well that he should stay until he got well; that he returned to his employment on December 14, 1925, and at that time started to work and continued his work until January 15, 1926; that for his work he was paid from December 14, 1925 to January 15, 1926; that he was paid a salary at the rate of \$130.00 a month.

On cross-examination, he testified that the request he made in July, 1925, was the first one he had ever made for leave of absence on account of sickness; that he was on vacation two weeks with pay; that at the end of two weeks his pay stopped and then his leave of absence commenced, without pay; that it was the first leave of absence he ever had in his service of the County and that it was owing to him illness; that he was not a civil service employee, and never

Counsel for the respondents admitted the earnings up to the last period beginning December 15th and ending January 15th and that he was on the payroll and drew a salary

for that period; but they denied that he was a bona fide employe during that period," and when asked by the Court, "You admit he was on the payroll and did work?" counsel for the respondents, answered in the affirmative.

The evidence of Samuel E. Erickson, the Clerk of the Superior Court, is to the effect that in the summer of 1925, he had a talk with the relator about a leave of absence; that the relator reported to him after his return from his vacation, and said he was very ill; that he found the relator in that condition, and told him to go and rest a while, and if he got in condition and was able to work, he would reinstate him; that he never discharged him; that the relator was on leave of absence without pay; that he continued to work until January, 1926.

On cross-examination, Erickson testified that he never made any suggestions to the relator as to an application for a pension; that about the 14th of December, the relator spoke to him about making an application and he, Erickson, said he had no objection to the relator making an application; that the relator was gone from July until he came back on December 14, 1925; that it was understood that he would re-employ him and put him back to work.

Counsel for the respondents, for the purpose of a reversal of the judgment, state that the record presents two questions, (1) Did the temporary employment which the relator had "from December 16, 1925 to January 15, 1926, for the evident and sole purpose of making him a 'present employe' of the County under the Pension Act," entitle him to participate in the Benefit Fund; and, (2) If the relator became entitled to participate in the Benefit Fund, was the application filed

for that period; but they denied that he was a bona fide employee during that period," and when asked by the Court, "You admit he was on the payroll and did work" counsel for the respondents, answered in the affirmative.

The evidence of Samuel R. Erickson, the Clerk of the Superior Court, is to the effect that in the summer of 1935, he had a talk with the relator about a leave of absence; that the relator reported to him after his return from his vacation, and said he was very ill; that he found the relator in that condition, and told him to go and rest a while, and if he got in condition and was able to work, he would reinstate him; that he never discharged him; that the relator was on leave of absence without pay; that he continued to work until January, 1936.

On cross-examination, Erickson testified that he never made any suggestion to the relator as to an application for a pension; that about the 14th of December, the relator spoke to him about making an application and he, Erickson, said he had no objection to the relator making an application; that the relator was gone from July until he came back on December 14, 1935; that it was understood that he would re-employ him and put him back to work.

Counsel for the respondents, for the purpose of a reversal of the judgment, state that the record presents two questions, (1) Did the temporary employment with the relator end from December 14, 1935 to January 15, 1936, for the purpose and sole purpose of making him a present employee of the County under the Pension Act, and (2) If the relator became entitled to participate in the Pension Fund, was the application filed

by him on December 14, 1925, two weeks before December 31, 1925, the necessary day to be in the County service, effective as an application, or was it premature and ineffective and void?

(1) It is evident that the trial judge was of the opinion that the evidence showed that the relator was a regular employe of the County, in the Office of the Clerk of the Superior Court from December 14, 1925 to January 15, 1926, and was entitled to be considered a "present employee" of the County, under the Act, and to participate in the Benefit Fund.

Counsel for the respondents do not point out, even if it were important, any evidence which may be said to prove that the relator went back to work, and was employed for the sole purpose of making him a "present employee". It is true he was ill in the summer of 1925, and was not well in the fall of the year, but the evidence shows that he did his work, earned his pay, and was properly paid for his services by the County.

In an opinion this day handed down by this Court in the case of The People, ex rel Patterson v. Gregson, et al., General Number 32234, which involved a somewhat similar claim to that in the instant case, we said,

"As we have said, there was a contract for services, fully executed on both sides. As far as the respondents were concerned, that was complete evidence of a compliance with the act, and a justification to issue a certificate of prior service to the relator as a "present employee" under the act, and to pay her the annuity payments due thereunder.

by him on December 14, 1935, two weeks before December 17, 1935, the necessary day to be in the County service, effective as an application, or was it premature and ineffective and void?

(1) It is evident that the trial judge was of the opinion that the evidence showed that the relator was a regular employee of the County, in the Office of the Clerk of the Superior Court from December 14, 1935 to January 15, 1936, and was entitled to be considered a "present employee" of the County, under the Act, and to participate in the General Fund.

General for the respondents do not point out, even if it were important, any evidence which may be said to prove that the relator went back to work, and was employed for the sole purpose of making him a "present employee". It is true he was ill in the summer of 1935, and was not well in the fall of the year, but the evidence shows that he did his work, earned his pay, and was properly paid for his services by the County.

In an opinion this day handed down by this Court in the case of Relator v. Attorney General, which involved a somewhat similar claim to that in the instant case, we said:

"As we have said, there was a contract for services. Fully executed on both sides, as far as the respondents were concerned, that was complete evidence of a compliance with the Act, and a justification to issue a writ of habeas corpus to the relator as a 'present employee' under the Act, and so pay her the monthly payments due respondents."

The County having obtained a full quid pro quo, services rendered from December 15, 1935 on, concerning which services no complaint is made, and which, therefore, are presumed to have been satisfactory, and rendered in full, it is of no moment to the respondents what the motives of the contracting parties were on December 15."

Counsel for the respondents have cited Wash v. Neazor, Volume 2, 1208 Irish Reports, page 46. In that case one of the parties undertook to get something for nothing, and which the act expressly provided he could not have. Here, there is mutuality of consideration, services rendered by the relator, and wages paid by the County, less, however, the amount deducted and retained for the purposes of the Benefit Fund. Here, the conduct of the parties did not result in any frustration of the act; the relator showed he had complied with the law; had rendered certain services over a long period of years, and was, at the close of the year 1935, in the employ of the County.

(2) The point is made in the brief of the respondents, that the application of the relator was filed prematurely, but there is no argument on that subject in the brief, and so it need not be considered. However, we do not know of any good reason why, although the application was filed on December 14, it should not be considered as properly filed, especially when Erickson testified that the relator went back to work on the 14th.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDEN AND WILSON, JJ. CONCUR.

The County Auditor obtained a full and complete list of the County Auditor's records from December 15, 1935, on, concerning which evidence was submitted in the case, and which, therefore, are presumed to have been satisfactory, and rendered in full, it is of no moment to the respondents what the activities of the respondents parties were on December 15.

Counsel for the respondents have cited Wright v.

Wright, Volume 2, 1908 Ohio Reports, page 46. In that

case one of the parties undertook to get something for

nothing, and which the act expressly provided he could

not have. Here, there is actuality of consideration,

services rendered by the taxpayer, and wages paid by the

county, hence, however, the contract between and retained

for the purpose of the benefit fund. Here, the con-

tract of the parties did not result in any frustration of

the act; the taxpayer showed he had complied with the law;

had rendered certain services over a long period of years,

and was, at the close of the year 1935, in the employ of

the County.

(2) The point is made in the brief of the

respondents, that the application of the taxpayer was filed

prematurely, but therein no argument on that point in the

brief, and no it need not be considered. However, we do not

know of any good reason why, although the application was

filed on December 14, it should not be considered as properly

filed, especially when Erickson testified that the taxpayer

went back to work on the 14th.

For the reasons stated, the judgment will be affirmed.

REINHERS.

HOLSON AND NISBET, JR. CORPUS.

817-32253

RICHARD H. NORTON,

APPELLEE,

vs.

J. H. HOOPER,

APPELLANT.

243 LA. 846

APPEAL FROM

MUNICIPAL COURT

OF ORANGE.

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the Court.

On January 3, 1927, Dr. Richard H. Norton, as plaintiff, filed a statement of claim in the Municipal Court against J. H. Hooper, as defendant, in which it was alleged that he, the plaintiff, had a claim against the defendant in the sum of \$115.00, "which represents a claim for professional services rendered Curtis Hooper, minor son of said J. H. Hooper, on December 24th, December 26th and December 31st, 1925, and January 2, 1926, at Boston, Massachusetts." There was a trial, before the court, with a jury, and a verdict and judgment in favor of the plaintiff in the sum of \$65.00. This appeal is by the defendant from that judgment.

The evidence of the plaintiff is, that he has been a dentist and oral surgeon since 1909; that he is a graduate of Tuft's Dental College, and President of the Massachusetts Dental Society; that he rendered professional services to Curtis Hooper, the minor son of the defendant; that on December 24, 1925 he removed from the jaw of Curtis Hooper two impacted molars; that he

242 . A. I. 342

Opinion filed March 28, 1988

took two sutures and applied dressings to each wound, using local anaesthesia; that on December 26, he removed both dressings from the wounds; that on December 31 he removed the sutures; that on January 2, 1926, he applied local treatment to the wounds; that Curtis Hooper said that he was a student, and that he, the plaintiff, should send the bill to his, Curtis Hooper's father, who would pay the bill; that Curtis Hooper gave him, the plaintiff, his father's address; that he, the plaintiff, made a reasonable charge of \$115.00 for the work done; that the charge of \$50.00 for operating on an impacted tooth is the minimum charge made in Boston; that the operation was a major surgical operation which necessitated complete dissection of the mucous membrane covering the jaw bone; also the removal of jaw bone surgically by cutting with a mallet and chisel, sufficient to elevate and remove malposed teeth; that he took X-Ray pictures of the mouth of Curtis Hooper and used them in connection with the operation that he performed; that the operation consumed about one hour for both teeth.

The evidence of the witness Desitt, called by the plaintiff, who testified by deposition, is that he was a dentist, and lived in Cambridge, Massachusetts; that he was a graduate of Tuft's Dental College, and had been practicing dentistry for twenty-seven years; that on December 22, 1925, in his office, he examined Curtis Hooper, and found that he had two impacted teeth; that he advised him to see the plaintiff for treatment; and gave him a card to the plaintiff; that he referred him to the plaintiff

[illegible]

because upon examination he found that the trouble was such that it necessitated the services of an oral surgeon; that he knew that the teeth would have to be operated upon; that as he was not an oral surgeon he advised him to go to the plaintiff.

The evidence of the defendant, who was called by the plaintiff under Section 33 of the Municipal Court Act, is that Curtis Hooper was his son, and at the time of the trial, was twenty years of age; that he learned the plaintiff did some dental work for Curtis Hooper, but not until some time after it was done.

The defendant put in no evidence.

The defendant contends that an express promise or circumstance from which a promise can be inferred is indispensably necessary in order to bind the parent for necessities furnished his infant child by a third person; that pulling two impacted teeth where there was no showing that it was necessary to pull them, or that the minor was suffering any pain or injury from the teeth is not within the common law definition of necessities; that a minor has no authority in Illinois to buy dental work on the credit of his parents; that the burden is upon the plaintiff to show that the parent was derelict in his duty, and that the presumption is that the father has performed his duties as a father.

As to the contention that an express promise is necessary in order to bind the parent, the record shows that when the defendant entered his appearance and demanded a jury trial, he wrote upon the appearance,

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"and again tender plaintiff Seventeen Dollars (\$17.00)."
That was not only an admission that the work was done, but an admission that the defendant was liable, to some extent, for that work. Further, when he was being examined under Section 33, and was asked the question, "Did you pay for the work?" he answered, "The dentist sent me a letter and a bill for it and I sent him a check in." That, also, was evidence that he went so far as to recognize an indebtedness for the services of the plaintiff.

As to surgical and medical services, the court said in the case of Slauensklee v. Low, 29 Ill. App. 408,

"If, as must be conceded, expenditures made or debts incurred for food, raiment, shelter, and even medicine, for the family, are for the 'expenses of the family,' as these words were intended to be understood by our Legislature, it is difficult to find any good reason why a debt incurred for professional skill and advice, employed in directing the proper use of a remedy to alleviate the suffering, cure disease, and restore the health of members of the family, would not be one of the expenses of the family within the meaning of the act."

Garrison, Pirie, Scott & Co. v. Woodward, 232 Ill. App. 351.

Mandel Bros. v. Ringstrom, 139 Ill. App. 564. Yeunkin v.

Kesick, 29 Ill. App. 373.

In Strong v. Peets, 42 Conn. 203, it was held that the filling of the decayed teeth of a fifteen year old minor, the work being necessary to the preservation of the teeth, was within the class, called "necessaries." Hamilton v. Lane, 133 Mass. 358, 360.

It has been held that one who furnishes necessities to a minor child without authority from the parent, cannot recover therefor from the latter without showing that the parent neglected or refused to provide for the minor's needs;

THE UNIVERSITY OF CHICAGO PRESS

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SECRET 012, SOLVING THE CASE THE POLICE

Responsible v. Not Responsible

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Source, Captain and Major (retired) American Civil War

Allen v. Jacobi, et al, 14 Ill. App. 277; Quinner v. Underwood, 68 Ill. App. 121; Gotts v. Clark, 78 Ill. 229; and it has been held that a parent is not liable for necessities furnished to his infant child by a third person, unless there is an express promise to pay therefor, or circumstances from which a promise can be inferred. Hunt v. Thompson, 3 Conn, 170; Green v. Birch, 2 Ill. App. 538; Murphy v. Ottenheimer, 84 Ill. 39; Folsuckle v. Bierman, 89 Ill. 454.

Here, however, the minor was, of course, away from home, being a student at Harvard College, at Cambridge, Mass., and was there with his father's consent; and in that situation, the plaintiff was entitled to infer that the father would pay the reasonable charge for such surgical and medical services as were essential to the health of his son. We cannot agree, therefore, with the defendant that when it was determined by Hewitt, and by the plaintiff, after X-rays had been taken, that the minor son had two impacted teeth that would have to be operated upon, the services of the plaintiff in performing the operation described by him, were not in the nature of "necessaries," to be paid for by the father. The matter was tried before a jury, and their verdict means that, as a matter of fact, as well as of law, the services to the minor were such that the defendant was liable therefor.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

HOLCOM AND WILSON, JJ. CONCUR.

[illegible]

326 - 32267

PETER W. HOFFMAN, Successor to
Charles W. Peters, Sheriff of
Cook County, Illinois, for use
of William Jacobs,

Defendants in Error,) ERROR TO

v.)

SUPERIOR COURT,
COOK COUNTY.

J. GRAY LUCAS, OLIVE C. LUCAS,
LAVANNA HENDERSON and JOHN F.
HENDERSON,

Plaintiffs in Error.)

Opinion filed March 29, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

On November 1, 1924, the plaintiff, Hoffman for
the use of Jacobs, brought suit in the Superior Court against
the defendants on a replevin bond in the sum of \$2400.00.

The declaration alleges that on March 10, 1923,
the defendants bound themselves in writing (by bond) to the
plaintiff in the sum of \$2400.00; that the writing was subject
to a certain condition whereby - after reciting to the effect
that J. Gray Lucas on October 3, 1922, sued out of the
Superior Court, a writ of replevin against William Jacob,
Lee Gansler and Frank Shapero, for the recovery of certain
goods and chattels, and the plaintiff, being Sheriff, was
about to execute the writ - it was provided that if the
said J. Gray Lucas should prosecute his suit to effect and
without delay and he should make return of the goods and
chattels if return thereof should be awarded, and should
save and keep harmless the plaintiff, Sheriff, in replevining

WILLIAM J. JACOB, Successor to
Charles E. Jacob, Sheriff of
Cook County, Illinois, for use
of William Jacob.

Defendants in Error, Answer to

Plaintiff in Error.

Plaintiff in Error.

GRAY LUCAS, OLIVE C. LUCAS,
LILLIAN KENNEDY and JOHN F.
KENNEDY.

Plaintiffs in Error.

Opinion filed March 20, 1928.

MR. PRESIDING JUSTICE YALOW delivered the

opinion of the court.

On November 1, 1924, the plaintiff, William Jacob, for
the use of Jacob, brought suit in the Superior Court against
the defendants on a note payable to the sum of \$2400.00.

The declaration alleges that on March 10, 1925,

the defendants bound themselves in writing (by deed) to the
plaintiff in the sum of \$2400.00; that the writing was subject
to a certain condition whereby - after reciting to the effect

that J. Gray Lucas on October 2, 1923, used out of the

Superior Court, a writ of replevin against William Jacob,

the said Lucas and Frank Spigare, for the recovery of certain
goods and chattels, and the plaintiff, being Sheriff, was

about to execute the writ - it was provided that if the

said J. Gray Lucas should prosecute his suit to effect and

without delay and he should make return of the goods and

chattels if return thereof should be awarded, and should

save and keep between the plaintiff, Sheriff, in replevin

said goods and chattels, then the writing obligatory was to be void, otherwise to remain in full force and effect.

That, although afterwards, the plaintiff, as Sheriff, by virtue of the writ, replevined and made deliverance of the goods and chattels to J. Gray Lucas; that although, afterwards, in the Superior Court, it was considered and adjudged by the Court that J. Gray Lucas, should take nothing by his said writ, and that William Jacobs should go without day and should have a return of the goods and chattels, nevertheless, J. Gray Lucas did not make a return of the goods and chattels, or any part thereof, but has refused, and still refuses to do so; as a result of which, there has accrued to the plaintiff to demand of the defendants for the use aforesaid mentioned, the sum of \$2400.00, including in said amount attorney's fees.

On July 27, 1925, J. Gray and Olive G. Lucas filed their appearance and a general demurrer, and on September 8, 1925, Lavanna Henderson and John P. Henderson did likewise.

On October 23, 1926, the defendants' demurrers were overruled, and on the same day they filed a plea of the general issue and a special plea. The special plea is as follows:

"And for a further plea herein, the said defendants * * *, actio non say; that said plaintiff ought not to maintain his said action against them, the defendants aforesaid, nor either of them because he says that subsequently to the time of the commission of said alleged grievances in the declaration mentioned, and prior to the commencement of this action, at the county aforesaid, the said defendants, or either of them paid to the plaintiff, and the plaintiff then and there accepted from the

said goods and chattels, then the writing obligatory was to be void, otherwise to remain in full force and effect.

That, although a return, the plaintiff, as already

of virtue of the writ, received and such delivery of the goods and chattels to J. Gray Jones; that although, afterwards, in the Superior Court, it was considered and adjudged by the

Court that J. Gray Jones, should take nothing by his said writ, and that William Jackson should go without day and should have a return of the goods and chattels, nevertheless, J.

Gray Jones did not make a return of the goods and chattels, or any part thereof, but has retained, and still retains to do so; as a result of which, there has occurred to the plaintiff to demand of the defendants for the use aforesaid money, and the plaintiff, in this regard, is in this regard.

On July 27, 1925, J. Gray and Olive E. Jones

filed their appearance and a general demurrer, and on September 8, 1925, Lawrence Henderson and John F. Henderson did

On October 23, 1925, the defendants' demurrers

were overruled, and on the same day they filed a plea of the general issue and a special plea. The special plea is as follows:

"And for a further plea herein, the said defendants say that said plaintiff ought not to maintain his said action against them, the defendants aforesaid, nor either of them because at the time of the commission of the alleged trespass in the detention mentioned, and prior to the commencement of this action, at the county aforesaid, the said defendants or either of them paid to the plaintiff, and the plaintiff thereupon accepted the same."

defendant, J. Gray Lucas, full satisfaction and discharge of said grievances the sum of to-wit, \$685.00. And this the defendant is ready to verify.

Wherefore he prays judgment if the plaintiff ought to maintain his action against them."

The special plea was not verified.

On November 8, 1926, the plaintiff filed a replication, which contained the following:

"that the defendants nor either of them, subsequent to the time of the commission of the said alleged grievances in the Declaration mentioned and prior to the commencement of this action, did not pay to the plaintiffs and the plaintiffs did not then and there accept from the defendant, J. Gray Lucas, in full satisfaction and discharge of said grievances the sum of to-wit: Six Hundred Eighty Five Dollars, (\$685.00) nor any other amount as they have above in that plea alleged and this the plaintiffs pray may be inquired of by the country, etc."

On November 17, 1926, the defendants filed a demurrer to the plaintiff's replication. The demurrer was verified.

On November 23, 1926, the defendants filed a plea of puis darrein continuance, which contains the following:

"that the plaintiff ought not further to maintain his aforesaid action against them, the defendants, because he says, that after the last proceedings and pleadings in this cause, that is to say, after the 17th day of November A. D. 1926, in the November term thereof - this same term and before or on this day, to-wit: on the 23rd day of November, there issued out of the Appellate Court of Illinois, First District, a writ of error and a supersedeas thereon,

in the case of J. Gray Lucas v. Lee Gansler, Wm. Jacobs, et al., lately in the Superior Court of Cook County, No. 382,734, and that therefore, said cause is undetermined and is lis pendens in said Appellate Court, Number 21611.

"That this cause of action is based upon a bond executed by the defendants herein in the above cause, No. 382,734, in said Superior Court, to the Sheriff of Cook County, Charles W. Peters, as an indemnifying bond in said cause, which was a Replevin suit, and now pending on Writ of Error and Supersedeas issued therein.

And this, the defendant, is ready to verify; wherefore, he prays judgment if the plaintiff ought further to maintain his aforesaid action, etc."

This plea was not verified.

On November 24, 1926, the Court overruled the demurrer to the plaintiff's replication, and ordered that the defendants' plea of Puis Darrein Continuance be stricken from the files. The matter was then submitted to the jury, which, after hearing the evidence, found the issues for the plaintiff; finding the debt to be \$2400.00 and assessing the plaintiff's damages at the sum of \$1600.00.

Motions of the defendant for a new trial and in arrest of judgment were made and overruled, and the verdict of the jury confirmed, and it was ordered that upon the payment of the damages, with interest and costs, the debt should be discharged. This appeal is from that judgment.

It is contended for the defendant that the trial judge erred in striking from the files the plea of puis darrein continuance. Apart from the question of the appropriateness of the plea, it is claimed for the plaintiff that it was properly stricken because it was not verified.

in the case of J. Gray Jones v. Mrs. Conner,
No. 1000, et al., lately in the Superior
Court of Cook County, No. 1000, et al.,
wherein, said cause is mentioned and in
its caption is said appellate court, number
1000.

That this cause of action is based upon a
bond executed by the defendant herein in the
sum of \$100,000, in said Superior
Court, to the Sheriff of Cook County, Illinois,
as an indemnifying bond in said
cause, which was a return only, and now pending
on writ of error and supersedeas issued
therein.
And that, the defendant, in order to verify
said return, he gave judgment to the plaintiff
to the extent of said return.

This plea was not verified.

On November 24, 1900, the Court overruled the
demurrer to the plaintiff's replication and ordered that

the defendant's plea of plea herein

stricken from the files. The matter was then submitted
to the jury, which, after hearing the evidence, found the
issues for the plaintiff; finding the debt to be \$100,000
and assessing the plaintiff's damages at the sum of \$100,000.

Motions of the defendant for a new trial and in

arrest of judgment were made and overruled, and the verdict
of the jury confirmed, and it was ordered that upon the
payment of the damages, with interest and costs, the debt
should be satisfied. This is the case.

It is contended for the defendant that the trial
judge acted in striking from the files the plea of plea

plea herein. Apart from the question of the
appropriateness of the plea, it is claimed for the plaintiff
that it was properly stricken because it was not verified.

Counsel for the defendants, in their brief, urge the contrary, and cite Robertson v. Burkell, 2 Scan. 278, and Ross v. Nesbitt, 3 Gilman, 252. However, in Mount v. Scholes, 120 Ill. 394, the court, in considering a plea of puis darrein continuance, said:

"A plea of this kind involves grave legal consequences that do not attach to an ordinary plea. It only questions the plaintiff's right to further maintain the suit. When filed, it, by operation of law, supersedes all other pleas and defenses in the cause, and the parties proceed to settle the pleadings de novo, just as though no plea or pleas had theretofore been filed in the case. By reason of pleas of this kind having a tendency to delay, great strictness is required in framing them. In this respect they are viewed much like pleas in abatement, and, for the same reason, they must, like those pleas, be verified by affidavit. 1 Chitty's Pleading, (12th Am. ed.) 660."

In the Robertson case (supra), the court held that the plea there filed, by reason of the nature of its contents, was a plea in bar, and consequently, did not need to be verified; and in the Ross case (supra) the court said, referring to the plea that was filed in that case, "It was not verified by affidavit, which was necessary for the twofold reason that it was a plea in abatement, and a plea puis darrein continuance."

Being of the opinion that it is the law that a plea of puis darrein continuance, such as was filed in this case, should be verified, it follows that the trial judge did not err in striking it from the files.

Further, inasmuch as there is before us merely the common law record, we are not entitled to review the judgment of the Superior Court in striking the plea from the files. As the Court said in Fanning, et al v. Russell,

100-
 100-100. I certify the following (19th Jan. 1904.)
 names, they must, like those given, be verified
 made like those in a statement, and for the same
 reasons. In this respect they are identical
 formerly to delay, given in a statement in response to
 name. The reason of place of this kind having a
 place or place had therefore been filled in the
 article the following of 100. Just as though no
 names in the same, and the parties involved in
 action of law, superseded all other places and de-
 it only mentions the plaintiff's right to sue
 necessary that do not attach to an ordinary place.
 A list of this kind involves grave legal con-

Filed Pursuant to 17 CFR 201.27 (a)(2) by the Registrant on 08/11/2014

that the plea there filed, by reason of the nature of the contents, was a plea in bar, and consequently, did not need to be verified; and in the last case (above) the court said, relating to the plea that was filed in that case, "It was not verified by affidavit, which was necessary for the twelfth reason that it was a plea in abatement, and a plea

1. The Board of Directors of the American Telephone and Telegraph Company, Inc. (AT&T) has approved the proposed acquisition of the American Telephone and Telegraph Company, Inc. (AT&T) by the American Telephone and Telegraph Company, Inc. (AT&T).

81 Ill. 398:

"It is assigned for error that the court erred in striking the pleas from the files, in rendering judgment by nil dicat, and in rendering judgment for the amount mentioned.

"We cannot, on this transcript, review the judgment of the Circuit Court in striking the pleas from the files. We have nothing in the record showing what cause was made to appear before that court. There is no bill of exceptions preserving the evidence heard by the Circuit Court upon that motion. * * * There being no bill of exceptions to show the contrary, this court will presume that a proper case for such an order was made before the Circuit Court."

Likewise, in Witherstine, et al v. Snyder, et al, 231 Ill.

App. 251, where certain matters, which were not incorporated in the bill of exceptions, were assigned as error and called to the attention of the court. This Court in discussing those matters, admitted that the trial court had erred, but, nevertheless, stated that such errors, in the absence of a bill of exceptions, could not be relied upon for a reversal of the judgment. The Court there said,

"A motion to strike pleas from the files, the decision of the court thereon and exception taken do not become part of the record unless preserved in a bill of exceptions. Gaynor v. Hibernia Sav. Bank, 188 Ill. 577; Snell v. Trustees A.E. Church of Clinton, 58 Ill. 290; Gaddy v. McCleave, 59 Ill. 182; Fanning v. Russell, 81 Ill. 398.

"In view of the rule as we understand it, we are not in a position to consider the various errors assigned by the plaintiffs in error because the questions presented therein have not been preserved in a bill of exceptions."

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLCOM AND WILSON, JJ. CONCUR.

[illegible]

[Faint, illegible handwritten notes]

[illegible]

1. The following information was obtained from the files of the Federal Bureau of Investigation, Department of Justice, Washington, D. C., on the subject of the above captioned case:

How little do I know of the world, and how much I have to learn.

J. E. MANN, doing business as)
MANN'S FASHION SHOP,)

Plaintiff in Error,)

v.)

FEDERAL SURETY COMPANY,)
a corporation,)

Defendant in Error.)

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. JUSTICE HOLDEN delivered the opinion
of the court.

This writ of error is sued out by plaintiff in
an effort to have this court reverse a judgment of nil
capiat and for costs against him, J. E. Mann, doing business
as Mann's Fashion Shop, whose place of business was at 158
North Cicero Avenue, Chicago.

The action is brought on what is termed a mer-
cantile open stock burglary policy issued to plaintiff by
the Federal Surety Company, the amount insured being limited
to \$10,000. covering the time between November 23, 1925 and
November 23, 1926, at 12 o'clock noon, standard time at
Chicago.

The declaration consists of three counts, in
the second of which the insurance policy is set out ver-
batim. The action is founded upon a claim that burglary
had been committed within the premises of the plaintiff
in which merchandise of the value of \$3561.35 was carried

540 A.A. 340

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TO THE HONORABLE JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILENOIS

PLAINTIFF IN ERROR,

VERSUS

DEFENDANT IN ERROR,

FEDERAL SURETY COMPANY, A CORPORATION,

Opinion filed March 29, 1928.

MR. JUSTICE HOLMES delivered the opinion

of the court.

This writ of error is sued out by plaintiff in

an effort to have this court reverse a judgment of all

and for costs against him, J. E. Mann, doing business

as Mann's Fashion Shop, whose place of business was at 128

North Illinois Avenue, Chicago.

The action is brought to set aside a judgment

and to set aside the judgment and to set aside the

and to set aside the judgment and to set aside the

to \$10,000, covering the time between November 22, 1925 and

November 22, 1926, at 12 o'clock noon, standard time at

Chicago.

The declaration consists of three counts, in

the second of which the insurance policy is set out ver-

batis. The action is founded upon a claim that plaintiff

had been committed within the premises of the plaintiff

in which merchandise of the value of \$2000.00 was carried

away on the 25th day of February, 1926. Defendant interposed to this declaration a plea of the general issue together with an affidavit of merits in which defendant denied the loss, the burglary and the felonious entry, and averred other matter in defense which the proofs of defendant tended to support.

Plaintiff in its brief states that the only defense averred by defendant related solely to its defense based upon Subdivision 4 of Paragraph E of the burglary policy, which is as follows:

"The company shall not be liable for loss or damage * * * (4) if the assured * * * is implicated as a principal or an accessory in effecting or attempting to effect the burglary."

The defense upon which defendant relied was under the first paragraph of the policy, which provides that:

"For all loss by Burglary of merchandise, furniture, fixtures and equipment, from within the Assured's premises as hereinafter defined, occasioned by any person or persons who shall have made felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools, explosives, electricity or chemicals."

There was a trial before court and jury and a verdict in favor of defendant, upon which the court after denying motions for a new trial and in arrest of judgment, entered a judgment of nil capiat and for costs.

Plaintiff assigns for error and argues for reversal the giving by the court of instructions numbers 2 and 18 at the request of defendant, which he contends were erroneous,

away on the 28th day of February, 1934. Defendant inter-
posed to this decision a plea of the General issue to-
gether with an affidavit of merit in which defendant denied
the loss, the burglary and the false entry, and averred
other matter in defense which the proofs of defendant tended
to establish.

Materiality in this case states that the only defense
averred by defendant related solely to the defense based
upon Subdivision 5 of Paragraph 2 of the burglary policy,
which is as follows:

"The company shall not be liable for loss
or damage * * * (4) if the insured * * * is in-
cited as a principal or an accessory in at-
tempting to effect the burglary."

The defense upon which defendant relied was under the first
paragraph of the policy, which provides that:

"For all loss by burglary of merchandise,
furniture, fixtures and equipment, from within
the premises, the insured's premises as hereinafter de-
scribed, by any person or persons who shall
have made forcible entry into the premises by
actual force and violence when the premises are
not open for business, or which force and violence
shall be visible marks upon the pre-
mises at the place of such entry by tools, explosives,
electricity or chemicals."

There was a trial before court and jury and
a verdict in favor of defendant, upon which the court
then granted motions for a new trial and in arrest of
judgment, entered a judgment of quid pro quo and for costs.

Materially material for error and argues for reversal
the giving by the court of instructions numbers 3 and 13
at the request of defendant, which he contends were erroneous.

being, as plaintiff argues, mandatory in form and highly prejudicial to the plaintiff's case. These instructions are as follows:

No. 3. "You are instructed that the plaintiff cannot recover against the defendant in this case, unless the plaintiff has proved by the greater weight or preponderance of evidence each of the following facts:

1. That plaintiff actually sustained a loss by burglary on February 25, 1936.

2. That plaintiff, directly or indirectly, either personally or by agents did not take any part in the alleged burglary.

3. That there were marks of felonious entry upon the plaintiff's premises; that the marks were made by the burglars, and the making of the marks actually preceded or were simultaneous with the burglary and not merely placed upon the premises after the removal of the goods from the premises of the plaintiff.

And if you find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence these facts, as stated, or that he has failed so to prove any one of them, he cannot recover against the defendant, and you should find the issues for the said defendant."

Instruction No. 18 reads:

"You are instructed that even if there actually was a loss or burglary in this case, but that any servant or employee, or business associate of the plaintiff is implicated as a principal or accessory in effecting or attempting to effect the loss or burglary, whether or not with the knowledge or consent or assistance of the plaintiff, you must find the issues for the defendant."

Incidentally, in order to reverse the judgment before us for review, we must first be able to say from the record that the evidence of defendant with all favorable inferences to be drawn therefrom by the jury are not sufficient to support the verdict of the jury in favor of defendant, or that an examination of all the proofs leads us to

being an alibi defense, mandatory in form and highly prejudicial to the plaintiff's case. These instructions are as follows:

No. 2. You are instructed that the plaintiff cannot recover against the defendant in this case, unless the plaintiff has proved by the greater weight of evidence each of the following facts:

1. That plaintiff actually sustained a loss by burglary on February 22, 1936.
 2. That plaintiff, directly or indirectly, either personally or by agents did not take any part in the alleged burglary.
 3. That there were marks of felonious entry upon the plaintiff's premises; that the marks were made by the burglar, and the making of the marks actually preceded or were simultaneous with the burglary and not merely placed upon the premises after the removal of the goods from the premises of the plaintiff.
- And if you find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence these facts, as stated, or that he has failed to prove any one of them, he cannot recover against the defendant, and you should find the issues for the defendant.

Instruction No. 16 reads:

This case is instructed that even if there actually was a loss or burglary in this case, but that any person or persons, or business associates of the plaintiff, are introduced as a participant or accessory in planning or attempting to effect the loss or burglary, whether or not the knowledge or consent or assistance of the plaintiff, you must find the issues for the defendant.

Incidentally, in order to reverse the judgment before us for review, we must first be able to say that the record that the evidence of defendant with all favorable inferences to be drawn therefrom by the jury are not sufficient to support the verdict of the jury in favor of defendant, or that an examination of all the issues leads us to

the conclusion that the verdict of the jury for defendant is contrary to the probative force of the evidence and is against the weight thereof. This necessitates a review by us of the evidence pro and con supporting plaintiff's and defendant's contentions.

The main and essential facts which we gather from the record are substantially as follows:

That for about four years prior to the occurrence in question plaintiff was dealing in ladies' wearing apparel at 158 North Cicero Avenue, Chicago, under the name of "Mann's Fashion Shop"; that in 1925 sales were between \$135,000 and \$140,000; that on the day when he claims his store was burglarized he was worth about \$50,000 and owned real estate in Chicago. The policy in suit plaintiff procured December 1, 1925, paying a premium of \$332.50 therefor; that the maximum indemnity was \$10,000 and covered the stock of goods in his store, and recovery was conditioned on a burglary resulting from a person or persons making felonious entry into the premises by actual force or violence when the premises were not open for business, of which force and violence there should be visible marks upon the premises at the place of such entry by tools, explosives, electricity or chemicals, and for all damage to merchandise caused by such burglary; that plaintiff's store was connected with the alarm system of the American District Telephone Company; that all possible openings were connected with a system of wire closed circuit alarm, so that when there was any interference with the circuit an alarm would occur and be visible in the premises of the A. D. T. Company which would dispatch men to investi-

the conclusion that the verdict of the jury for defendant is contrary to the preponderance of the evidence and is against the weight thereof. This necessitates a review by us of the evidence and our answering plaintiff's and defendant's contentions.

The main and essential facts which we gather from the record are summarized as follows:

That for about four years prior to the occurrence in question plaintiff was dealing in radios, having opened at 123 North Chicago Avenue, Chicago, under the name of "Radio's" (phonetic); that in 1935 sales were between \$125,000 and \$150,000; that on the day when the alarm was set off plaintiff had on hand about \$50,000 and owned real estate in Chicago. The policy in said plaintiff's name was December 1, 1935, paying a premium of \$232.50 therefor; that the maximum indemnity was \$10,000 and covered the stock of goods in his store, and recovery was conditioned on a burglary resulting from a person or persons making forcible entry into the premises by means of a forcible force or violence when the alarm was not upon the burglar, of which force and violence there should be visible marks upon the premises at the place of each entry by tools, explosives, electricity or chemicals, and for all damage to merchandise caused by such burglary; that plaintiff's store was connected with the alarm system of the American District Telephone Company; that all telephone wires were connected with a system of wire closed circuit alarm, so that when there was any interference with the wire communication would occur and be visible in the premises of the A. D. T. Company which would dispatch men to investigate.

gate and at the same time would also call the police. On February 25, 1936, plaintiff had in his employ three sales ladies, a tailor, and his wife and himself, of whom the tailor, Mr. Ferrella, and one saleslady, Miss Schwartz, were still in his employ at the time of the trial and testified for him at the trial. Plaintiff's store was rectangular in shape, 25 or 26 feet wide and 75 or 80 feet deep. In the back of the store was a little door leading into the office and the tailor shop; in the rear leading to an alleyway there was a door, two windows and a yard, windows 3 feet from the ground, and bars on the inside and outside; the back door was made of heavy wood and had bars inside and outside, and locked from the rear; there was an iron metal on the inside and a couple of bars across; next came the A.D.T. key system, wires about an inch apart across the transom and door and a big bar across the door.

Plaintiff's stock consisted of dresses and coats which were kept in open cases on hangrods; the cases were along the side and in the back of the store, the farthest case to the rear being about ten feet from the back, and the farthest case in the front being about three feet from the front of the store; the back yard to the rear of the store ran into an alley; automobiles at night parked in the yard.

Plaintiff kept books of account prior to the date of the claimed burglary, which books were audited by Gray, Hunter & Stearn, certified public accountants; their employment commenced in 1925 and continued until the time of the trial; they checked plaintiff's books about once a month;

On the same time would also call the police. On February 25, 1935, Plaintiff had in his employ three sales ladies, a girl, and his wife and himself, of whom the father, Mr. Fawcett, and one salesman, Mrs. Fawcett, were still in his employ at the time of the trial and testified for him at the trial. Plaintiff's store was rectangular in shape, 35 or 36 feet wide and 75 or 80 feet deep. In the back of the store was a little rear leading into the office and the father shop; in the rear leading to an alleyway there was a door, two windows and a yard, windows 5 feet from the ground, and bars on the inside and outside; the back door was made of heavy wood and had bars inside and outside, and looked from the rear; there was an iron metal on the inside and a couple of bars across; near the A.M.T. box, there was a door and a big bar across the door, the frame and door and a big bar across the door.

Plaintiff's stock consisted of dresses and coats which were kept in open cases on hangers; the cases were along the side and in the back of the store, the farthest case from being about ten feet from the back, and the farthest case in the front being about three feet from the front of the store; the back yard to the rear of the store ran into an alley; automobiles at night parked in the yard.

Plaintiff kept books of account prior to the date of the original burglary, which books were audited by Gray, Hunter & Stone, certified public accountants; their employment commenced in 1935 and continued until the time of the trial; they checked Plaintiff's books about once a month.

the last checking before the claimed burglary was in January 1926; the merchandise as received was entered in a stock book; items were subsequently entered in an inventory book; each garment was tagged on which were placed the manufacturer's number, the inventory number and the selling price; they were then put in stock and as sold the sales ticket was made out showing the selling price, the amount paid and any balance remaining due; at the close of business each day or at the opening of business the day following the sales tickets were entered in the inventory book, taking out each garment sold the day before; plaintiff also kept what he designated as a "recap book" which showed his daily sales and his entire income for the day; he also had a cash journal in which each article that was purchased and the general entries of a business of that type were made. It showed the money received, from whom and disbursements made and on what account. At the end of each month the entries in the cash journal were carried into the general ledger, showing the results of the business for that month. Plaintiff also kept what he termed a "perpetual inventory" showing all articles on hand on July 1, 1925, and all purchases and sales subsequent to that date. On July 1, 1925, every article in the store was recorded in the "perpetual inventory" and given a number; articles received after that date were given a number in rotation; that book showed from July 1, 1925, all of the articles purchased by plaintiff for his Fashion Shop, the purchase price, sales price, the date sold, and the date of return if any merchandise was returned. The accountants secured the information in checking the "perpetual inventory" from the purchase invoices and the sales tickets in plaintiff's files. On the

the first checking before the claimed burglary was in January 1932; the merchandise as received was entered in a stock book; items were subsequently entered in an inventory book; each payment was tagged on which were placed the merchandise's number, the inventory number and the selling price; they were then put in stock and as sold the sales tickets were made out showing the selling price, the amount paid and any balance remaining; at the close of business each day or at the opening of business the day following the sales tickets were entered in the inventory book, taking out each payment sold the day before; Plaintiff also kept what he designated as a "sales book" which showed his daily sales and his entire income for the day; he also had a cash journal in which each article that was purchased and the general entries of a business of that type were made. It showed the money received, from whom and disbursements made and on what account. At the end of each month the entries in the cash journal were carried into the general ledger, showing the transfer of the business for that month. Plaintiff also kept what he termed a "perpetual inventory" showing all articles on hand on July 1, 1932, and all purchases and sales subsequent to that date. On July 1, 1932, every article in the store was recorded in the "perpetual inventory" and given a number; articles received after that date were given a number in rotation; that book showed from July 1, 1932, all of the articles purchased by Plaintiff for his Fashion Shop, the purchase price, sales price, the date sold, and the date of return if any merchandise was returned. The merchandise entered the ledger in checking the "perpetual inventory" from the purchase invoice and the sales tickets in Plaintiff's files. On the

date of the so-called burglary the "perpetual inventory" showed 407 garments on hand, which cost \$11,324.08; the merchandise left in the store on that date comprised 24 garments worth \$855.

Plaintiff's store was kept open every day of the week except Wednesday until about ten or ten thirty at night, closing on Wednesday at 6 or 6:30; all employees remained in the store until closing time. The day of the occurrence was Thursday; on that day all employees were in the store, including plaintiff, his wife, the tailor and the three sales ladies; nothing unusual happened until after closing time, a quarter or twenty minutes past ten that night; all employees left the premises about the same time, and when they left the merchandise was in the store. On leaving the premises the windows were closed and the doors locked and the usual signal given to the A.D.T. Company. It was customary to give three signals and receive one signal back from the A.D.T., which would indicate that everything was closed. The doors were locked and the big cross bar was put across the back door, and the two iron brackets intended for its support. After everything was closed the A.D.T. Company was given the usual signal indicating the premises were completely locked. A light was left burning in the shop that night. Plaintiff left the store with his wife and went home and immediately retired for the night; at ten minutes past twelve midnight, the A.D.T. Company received an alarm from plaintiff's store and an alarm ticket was made out. Mr. Latch, the

date of the above-mentioned inventory showed 407 payments on hand, which cost \$11,224.00; the expenditures left in the store on that date comprised 34 payments worth \$255.

When the inventory was kept open every day of the week except Wednesday until about ten or ten thirty at night, closing on Wednesday at 6 or 6:30; all employees remained in the store until closing time. The day of the occurrence was Thursday; on that day all employees were in the store, including plaintiff, his wife, the teller and the three sales ladies; nothing unusual happened until after closing time, a quarter or twenty minutes past ten last night; all employees left the premises about the same time, and when they left the expenditures were in the store. On leaving the premises the windows were closed and the doors locked and the usual signal given to the A.B.T. Company. It was customary to give three signals and receive one signal back from the A.B.T. which would indicate that everything was closed. The doors were locked and the big cross bar was put across the back door and the two iron bars were intended for its support. After everything was closed at the A.B.T. Company was given the usual signal indicating the premises were securely locked. Light was not burning in the shop that night. Plaintiff left the store with his wife and went home and immediately notified for the night; at ten minutes past twelve midnight the A.B.T. Company received an alarm from plaintiff's store and an alarm ticket was made out. Mr. Leach, the

manager of the company, testified that he had with him the burglary alarm report on the alarm received that night from plaintiff's store; that he immediately notified the police and Mr. Mann at his home and sent two of his operators to the store, which they reached at 12:17. The police were there just ahead of them; that plaintiff and his wife were aroused from sleep by a telephone call shortly after midnight from the A.D.T. Company, telling him to rush over to the store. He dressed quickly and at the suggestion of his wife called up the A.D.T. to make sure of the call and was told to run over to the store at once; he did so and arrived at the store about seven minutes after he got the first call.

When plaintiff arrived at the store it had been entered by men from the A.D.T. Company and the police were there. Garments were strewn on the floor; the garments in the cases were missing; two policemen were in the back yard, and there were fresh automobile tracks; a policeman picked up a couple of garments in the yard and brought them into the store; plaintiff saw garments strewn about in the yard along side of the automobile tracks; the back door leading to the store was smashed in with a big railroad tie; the cross bar was hanging alongside of the door inside; one of the iron brackets was off and part of the frame in the bracket caved in; there was a large piece of timber about 3 to 5 feet long and 8 or 10 inches thick lying outside of the back door, which was open; but little stock remained in the store; plaintiff never saw the timber before that night; it did not belong to any one he knew;

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in the yard along side of the automobile tracks; the back
door leading to the store was smashed in with a big railroad
tie; the cross bar was hanging alongside of the door inside;
one of the iron bars were cut and part of the frame in
the window saved up; there was a large piece of timber
about 2 to 3 feet long and 3 or 4 inches thick lying on
side of the back door, which was open; but little stock
remained in the store; plaintiff never saw the timber be-
fore that night; it did not belong to any one he knew;

plaintiff continued in the store until after three in the morning and left when the police did, and the A.D.T. man remained on guard until the following morning. Plaintiff returned to the store at 8 A.M. and found the A.D.T. man there and the store in the same condition as when he left it at 3 o'clock. He checked the merchandise left in the store with Mr. Drysdale of the firm of Gray, Hunter & Stearn, accountants, and valued it at \$855. Thereupon plaintiff immediately notified his broker and in due course filed his proof of loss with defendant accompanied by a full inventory.

Defendant admitted on the trial the payment of the insurance premium and the filing of the proofs of loss. Plaintiff claims that defendant's evidence corroborates the testimony of his witnesses; that the condition found in the store after the so-called burglary indicated a robbery had been committed, and that the battered condition of the back door indicated that entry had been made by force and violence by means of crushing in the back door with a heavy piece of timber used as a battering ram.

Officer Courtney of the Austin Police Station testified that on the date of the alleged burglary, he received a call to go to plaintiff's store around 12:30 midnight. On his arrival he saw several police officers there, likewise plaintiff, and the two A.D.T. men and a Mr. Reninger. He discovered the back door was broken in the center and the top hinge on the right side hanging off. The panel of the door was forced in, hanging by some wires. He went into the back yard and found a plank 6x4

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morning and left when the police did, and the A.P.T. was
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returned to the store at 8 A.M. and found the A.P.T. was
there and the store in the same condition as when he left
it at 3 o'clock. He checked the merchandise left in the
store with Mr. Dwyer of the firm of Gray, Hunter & Stone,
accountants, and valued it at \$500. Thereupon plaintiff
immediately notified his broker and in due course filed his
proof of loss with defendant accompanied by a full inventory.

Defendant testified on the trial the payment of
the insurance premium and the filing of the proofs of loss.
Plaintiff claims that defendant's evidence corroborates the
testimony of his witnesses; that the condition found in the
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means of crowbar in the back door with a heavy piece of
timber used as a battering ram.

Officer Courtney of the Austin Police Station
testified that on the date of the alleged burglary, he re-
ceived a call to go to plaintiff's store around 11:30 mid-
night. On his arrival he saw several police officers
there, including plaintiff, and the two A.P.T. men and a
Mr. Easton. He discovered the back door was broken
in the center and the top hinge on the right side hanging
off. The panel of the door was forced in, hanging by some
wire. He went into the back yard and found a plank six

and about ten feet long lying about five feet from the door. He also saw foot prints at the base of one of the cases in which clothes were hung, apparently white plate colored clay. He saw on the clay "Goodyear Rubber Company" and he thought he saw the number 1746 on the heel print. He called Officer Miller and showed him the prints; then he looked at the plaintiff's shoes on which he saw the same kind of stuff he saw on the case, and that plaintiff had the same kind of rubber heel that the imprint showed on the board; that there was a number of Goodyear at the bottom of his heel, the same number that was on the floor in the room. He then asked plaintiff about the time when he got the clothes and whether they had been paid for. Plaintiff replied that he got them on the 25th of February and that he owed \$3,000 on them. He then refused to answer any further questions, stating that he was nervous. The officer then asked him where he had the clothes, and he said they were hanging on the hangers, and upon searching Officer Courtney found only three dresses. He then asked plaintiff whether it would be possible for anybody to grab the clothes off the racks and not drop any of the hangers on the floor, to which plaintiff replied that "it could be possible, they took the hangers and all with them." Officer Courtney found only one hanger on the floor and no dresses or other clothing in the back yard or alley. Officer Courtney said that the plaintiff was in the store ahead of him.

On cross-examination Officer Courtney testified that the clay imprint on the floor of the bin was dry and that he could see "Goodyear" perfectly; that the letters

and about ten feet long lying about five feet from the door. He also saw foot prints at the base of one of the cases in which clothes were hung, apparently white plastic colored clay. He saw on the day "Goodman Rubber Company" and the thought he saw the number 1744 on the heel print. He called Wilcox Miller and showed him the prints; then he looked at the plaintiff's shoes on which he saw the same kind of stuff he saw on the case, and that plaintiff had the same kind of rubber heel that the imprint showed on the board; that there was a number of "Goodman" at the bottom of his heel, the same number that was on the floor in the room. He then asked plaintiff about the time when he got the clothes and whether they had been laid for plaintiff replied that he got them on the 25th of February and that he was \$5,000 on them. He then refused to answer any further questions, stating that he was nervous. The officer then asked him where he had the clothes, and he said they were hanging on the hangers, and upon searching Officer Courtney found only three dresses. He then asked plaintiff whether it would be possible for anybody to grab the clothes off the racks and not drop any of the hangers on the floor, to which plaintiff replied that it could be possible, they took the hangers and all with them. Officer Courtney found only one hanger on the floor and no dresses or other clothing in the back yard or alley. Officer Courtney said that the plaintiff was in the store ahead of him. On cross-examination Officer Courtney testified that the clay imprint on the floor of the bin was dry and that he could see "Goodman" perfectly; that the letters

G-o-o-d-y-e-a-r were seen by him just as they were written out; that they were neither inside out nor upside down; that he was then asked whether he stopped to think that if the lettering "Goodyear" were on the heel and an impression made of it in clay or in mud, that the word "Goodyear" in the impression would be upside down, but he insisted that it was straight up in the imprint; that he could not say that the impression on the bin came from plaintiff's shoes; he did not know whether plaintiff was in the yard a few minutes before he got there or not. He testified that he was there a few minutes before plaintiff got there. He was sure that the clay and mud which had "Goodyear" in it was dry and the mud on plaintiff's shoes was also dry.

Officer Miller corroborated Officer Courtney's testimony about the foot print; that the mud on the floor appeared to be clay and ashes mixed, and that he judged from the appearance the size eight or nine shoe had made the impression. The print was dry and he saw plainly the name "Goodyear" in the heel of the print. The plaintiff was nervous and asked the officers not to ask him any more questions. He saw Courtney examine plaintiff's foot; that they both looked at the shoe print and at plaintiff's foot; that plaintiff had on rubber heels marked "Goodyear" and there were numbers on the heels, but he did not remember what they were; that there was dirt on them which seemed to be the same color as the dirt found in the bin. He also testified that plaintiff did not go into the alley in the rear of the store from the time he entered the store and the

police officers examined his heels. In his opinion the foot print which he observed was one or two hours old because, as he said, it would take that long to dry. On cross-examination he testified that he did not look at the feet of the eight or nine other men who were in the store, nor did he look at Officer Courtney's feet; that he did not consider it his duty to take plaintiff into custody; that plaintiff was excited and shook all over, and sat down while the officers picked up his heel; that no complaint was filed against him; that there appeared to be a robbery there; that Officer Miller testified that he was unable to decide who committed it, and did not mean to say that plaintiff had done so.

Police Sergeant Mullane, who also responded to the alarm at plaintiff's store, heard talking and conversation in the store after he got there, but did not witness any officer examining plaintiff's foot. He testified that there were probably ten or twelve foot prints, almost thoroughly dry and of a whitish color at the base of one of the bins, and that they must have been there at least an hour previously. Mullane arrived at the store before the doors were open; when he entered the store show cases and display cases were empty, but he saw some dresses in the repair room; he noticed that the upright beam at the back door was crashed in and the eye into which the beam fit when placed across the door to keep it shut was knocked out; that one of the hinges was broken so that the door was at an angle; that there were automobile tracks from the back yard to the cement alley; the yard was

Police officers examined his boots. In his opinion the foot print which he observed was one of two hours old because, as he said, it would take that long to dry. On cross-examination he testified that he did not look at the foot of the eight or nine other men who were in the store, nor did he look at Officer Gormley's foot; that he did not consider it his duty to take plaintiff into custody; that plaintiff was excited and shook all over, and that when called the officers went to the door; that he saw plaintiff was filed against him; that there appeared to be a robbery there; that Officer Miller testified that he was unable to decide who committed it, and did not mean to say that plaintiff had done so.

Police Sergeant Mulane, who also responded to the alarm at plaintiff's store, heard talking and conversation in the store after he got there, but did not witness any officer examining plaintiff's foot. He testified that there were probably ten or twelve foot prints, almost thoroughly dry and of a whitish color at the base of one of the prints, and that they must have been there at least an hour previously. Mulane arrived at the store before the doors were open; when he entered the store glass cases and display cases were empty but he saw some glasses in the repair room; he noticed that the weight beam at the back door was stretched in and the eye into which the beam fit when placed across the door to keep it shut was knocked out; that one of the hinges was broken so that the door was at an angle; that there were automobile tracks from the back yard to the cement alley; the yard was

very muddy; he did not notice any foot prints there until after his attention had been called to them.

Plaintiff testified that the witness Hagerty, one of the A. D. T. men who responded to the alarm, corroborated Mullane's testimony; that Hagerty saw one of the officers examine plaintiff's foot and that he looked at the heel himself and saw the word Goodyear there. However, in his written report he made no mention of foot prints.

Beninger, one of defendant's witnesses, testified that on the night of the trouble he lived in the building next door to plaintiff's store, and that from his window he could see the rear of the store; that he was awakened that night a few minutes after twelve by an awful crash; that he immediately jumped out of bed and went to the window and looked into the yard behind the store; that he saw a man standing there who ran to an automobile which was near the back entrance of the store; that he did not see anybody take anything from the plaintiff's store; that when the man heard him open the window he ran, gave a yell of some sort, and then got into the machine and went away; Beninger immediately dressed and went over to plaintiff's store; that he heard some conversation between plaintiff and the officers; that somebody stooped to pick up plaintiff's shoe, and his attention was called to the foot prints, but he did not examine them.

In rebuttal one of plaintiff's witnesses brought into court a Goodyear rubber heel, and following the instructions of counsel took an ink pad and made an impression on it with the rubber heel; he then took a blank piece of paper and

very much; he did not notice any foot prints there until after his attention had been called to them.

Plaintiff testified that the witness Hagerty, one of the A. P. men who responded to the alarm, corroborated witness's testimony; that Hagerty saw one of the officers examine plaintiff's foot and that he looked at the foot himself and saw the word "Goodman" there. However, in his sworn report he made no mention of foot prints. Plaintiff's brother, one of defendant's witnesses, testified that on the night of the trouble he lived in the building next door to plaintiff's store, and that from his window he could see the rear of the store; that he was awakened that night a few minutes after twelve by an awful crash; that he immediately jumped out of bed and went to the window and looked into the yard behind the store; that he saw a man standing there who ran to an automobile which was near the back entrance of the store; that he did not see anybody take a thing from the plaintiff's store; that when the man heard him open the window he ran, gave a yell of some sort, and then got into the machine and went away; that he saw some conversation between the man and the plaintiff's brother; that somebody attempted to pick up plaintiff's coat, and his attention was called to the foot prints, but he did not

Plaintiff and the plaintiff's witnesses testified that there was a shooting which took place in the building in which the trouble occurred, and that the plaintiff's brother and his brother-in-law were the only ones who were not injured.

made an impression there of the rubber heel, throwing all the weight of his body on the heel face down on the paper; and then made a lighter impression with the same rubber heel on the same pad and on a separate piece of paper; and plaintiff contends that no impression could be made straight up, and that the necessary effect of such an imprint of a heel of a shoe would be to show the word "Goodyear" upside down and inside out; and plaintiff contends that the police officers who testified for defendant were mistaken in saying that they saw the heel impression with Goodyear in the mud near one of the bins, and that they testified that the impression showed Goodyear straight up and neither upside down nor inside out.

The foregoing recitals of fact are culled from plaintiff's brief.

In this condition of the proofs on the questions of fact above recited, it was incumbent upon the court to submit the case to the jury for their determination. The evidence recited demonstrates that it is in sharp conflict in many important particulars. The facts are for the jury to determine and the questions of law are for the decision of the court. Neither may impinge upon the duty of the other.

The case presented by the record of the facts is typical for the decision of a jury, who saw the witnesses and had the opportunity of observing their conduct upon the witness stand, their manner of testifying, their candor or lack of it, their prejudice or bias, if such was manifest,

made an impression there of the rubber heel, throwing all the weight of his body on the heel lace on the paper; and then made a lighter impression with the same rubber heel on the same pad and on a separate piece of paper; and plainly contends that no impression could be made straight up, and that the necessary effect of such an imprint of a heel of a shoe would be to show the word "Goodyear" inside down and inside out; and plainly contends that the police officers who testified for defendant were mistaken in saying that they saw the heel impression with Goodyear in the mud next one of the shoes, and that they testified that the impression showed Goodyear straight up and neither upside down nor inside out.

The foregoing recitals of fact are culled from Plaintiff's brief.

In this condition of the proofs on the question of fact above recited, it was incumbent upon the court to submit the case to the jury for their determination. The evidence recited demonstrates that it is in such a conflict in many important particulars. The facts are for the jury to determine and the questions of law are for the decision of the court. Neither may inlay upon the duty of the other.

The case presented by the record of the facts is typical for the testimony of a jury, who saw the witnesses and saw the opportunity of observing their conduct upon the witness stand, their manner of testifying, their conduct or lack of it, their pretenses or bias, if such was manifested.

their relations to the parties and the subject-matter, and from all these opportunities to judge therefrom which contention on the facts was more worthy of reliance and belief. We cannot say from the record that the verdict upon which judgment was entered is not supported by a fair preponderance of the evidence, nor are we able to say that the verdict is contrary to the greater weight of the evidence. Neither one of these grounds, therefore, would justify our disturbing the conclusions to which the jury arrived, as evidenced by their verdict. Therefore, unless there is procedural error appearing in the record, the judgment must stand.

There are many suspicious circumstances appearing in the evidence, among which is the fact that the plaintiff arrived at the store within five to seven minutes after he received the call from the A.D.T. It seems almost incredible that unless plaintiff was expecting such a summons he could possibly be aroused from his slumbers and clothe himself and reach his store within that short space of time. Then there is the circumstance of the impression of the shoe of plaintiff having thereon dry mud, clay and ashes, the same as was at that time found in the back yard of his store only very wet; and the fact that the jury had a right to believe that he had "Goodyear" heels on his shoes, and that his shoes instead of being wet, were dry. The jury may have considered the conduct of defendant as indicating guilty knowledge that his goods were not lost to him through a burglary, by the nervousness which he betrayed on the night of the events transpiring in his store, and his refusal to answer questions of police officers on the plea of his

There are many things at my command appearing in the evidence, among which is the fact that the plaintiff arrived at the store within five to seven minutes after he received the call from the A.D.T. It seems almost incredible that unless plaintiff was expecting such a summons he could possibly be removed from his chambers and taken to jail and remain his store within that short space of time.

There were no other persons in the room at the time of the shooting. The only person in the room at the time of the shooting was the person who was shot.

and that his good instead of being wet, were dry. The

to answer questions of police officers on the basis of his
sight of the events from the rear, and the fact that
although a burglar, he was accompanied with a number of
other persons, and it would not be fair to say that he
may have considered the conduct of defendant as indicative

nervousness. The testimony of the witness Heninger, recited above, to the effect that he lived in an apartment overlooking the back yard of plaintiff's store, who was aroused from his sleep at about midnight by hearing a loud crash, and what appeared to him to be the sound of the beam being crashed into the door of plaintiff's store, and jumping out of bed reached the window ten seconds after the noise, and saw a man in the yard and also a roadster automobile, and a man in it who he heard yell to another and saw him run to the automobile, which the driver started at once and drove out of the back yard into the alley adjacent thereto; that he watched until the men went away and no one and nothing passed in or out of the door while he was watching; that he noted the time as 12:13 or 12:14; that he hurriedly put on a sweater and pair of trousers and slippers and ran down stairs where he met Officer McLaren. It is this sort of evidence, together with the other evidence found in the record which was the burden of the jury to consider and weigh, in arriving at their verdict, and we cannot say on this review that the verdict should, in point of law, be disturbed.

In this condition of conflict in the proof, the law requires accuracy in the rulings of the court upon the evidence and upon the instructions given to the jury.

We find no error in the rulings of the court upon the evidence and none is seriously argued. Gravamen of the complaint of the plaintiff rests on the giving of instructions Numbers 2 and 18, hereinabove recited.

testimony of the witness Hamilton, testified above, to the effect that he lived in an apartment overlooking the back yard of Plaintiff's store, who was aroused from his sleep at about midnight by hearing a loud crash, and when appeared to him to be the sound of the beam being attached into the door of Plaintiff's store, and jumping out of bed reached the window ten seconds after the noise, and saw a man in the yard and also a Fordster automobile, and a man in it who he heard yell to another and saw him run to the automobile, which the driver started at once and drove out of the back yard into the alley adjacent thereto; that he watched until the man went away and no one and nothing passed in or out of the door while he was watching; that he noted the time as 12:15 or 12:16; that he hurriedly put on a sweater and pair of trousers and slipped and ran down stairs where he met Officer Wilson. It is this sort of evidence, together with the other evidence found in the record which was the subject of the jury to consider and weigh, in arriving at their verdict, and we cannot say on this review that the verdict should, in point of law, be disturbed.

In this condition of conflict in the proof, the law requires accuracy in the findings of the court upon the evidence and upon the instructions given to the jury. We find no error in the findings of the court upon the evidence and none is seriously argued. Instruction numbers 7 and 18, heretofore recited,

The loss insured against was burglary from without the plaintiff's premises occasioned by a person or persons who shall have made felonious entry into the premises by actual force and violence, when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools, explosives, electricity or chemicals. To bring the plaintiff within the aforesaid terms of the policy, before he could recover thereon, the burden rested upon him to show that the property, the value of which plaintiff sought to obtain in this suit against defendant, was removed from the store after it had been entered by force and violence, and that external marks evidencing such forcible entry were visible at the place of entry. This he did not do. Such proof rested upon the plaintiff to make as a condition precedent to his right of recovery. If the jury found, as they reasonably might, and did, by their verdict, that the goods in suit were taken away from the store not as the result of a burglarious entry therein, then the verdict is justified.

It is therefore self-evident that if plaintiff's goods insured under the policy in suit, were not taken out of his store as a result of a forcible entry by feloniously disposed persons, but were removed voluntarily by some one in possession and not as the result of a felonious entry, then in the eye of the law plaintiff has not met with a loss recoverable under the terms of the policy in suit. Counsel for plaintiff say in their brief:

The loss incurred against was burglary from
without the plaintiff's premises consisted of a person or
persons who shall have made felonious entry into the pre-
mises by actual force and violence, when the premises are
not open for business, or when force and violence there
shall be victimized made upon the premises at the place
of such entry by tools, explosives, electricity or chemicals,
to bring the plaintiff within the aforesaid terms of the
policy, before he could recover thereon, the burden rested
upon him to show that the property, the value of which claim-
ant sought to obtain in this suit against defendant, was
removed from the store after it had been entered by force
and violence, and that external marks evidencing such
felonious entry were visible at the place of entry. This
he did not do. Such proof rested upon the plaintiff to
make as a condition precedent to his right of recovery. If
the jury found, as they reasonably might, and did, by their
verdict, that the goods in suit were taken away from the
store not as the result of a burglarious entry thereon,
then the verdict is justified.

It is therefore self-evident that if plaintiff's
goods insured under the policy in suit, were not taken out
of his store as a result of a felonious entry by defendant
disposed persons, but were removed voluntarily by some one in
possession and not as the result of a felonious entry, then
in the eye of the law plaintiff has not met with a loss
recoverable under the terms of the policy in suit. Defendant
for plaintiff may in that behalf;

"In our judgment, two of the instructions given on behalf of the defendant, being numbers 2 and 18 of the given instructions, are so inaccurate and misleading and highly prejudicial that we have ignored the other points which arise on this record as grounds for reversal, and shall limit ourselves to a discussion of the viciousness of these two instructions. Both are mandatory and the giving of each in itself, we submit, requires a reversal of the judgment."

Plaintiff, as to instruction No. 2, argues for reversal that the second clause thereof is erroneous, which is:

"2. That plaintiff, directly or indirectly, either personally or by agents did not take any part in the alleged burglary."

The instruction as a whole instructed the jury that there were three essential things which he must prove before he could recover. They were:

"1. That plaintiff actually sustained a loss by burglary on February 25, 1938."

2. As above recited.

"3. That there were marks of felonious entry upon the plaintiff's premises; that the marks were made by the burglars, and the making of the marks actually preceded or were simultaneous with the burglary, and not merely placed upon the premises after the removal of the goods from the premises of the plaintiff."

And these facts, the jury were instructed, must be proven by the plaintiff by a preponderance of the evidence.

It is our opinion that this instruction was without error, placing, as it did, upon the plaintiff the burden of proving those incidents necessary to be proved under the terms of the policy. It is plaintiff's contention that the

"In our judgment, two of the instructions, given on behalf of the defendant, being numbers 2 and 18 of the instructions, are so inaccurate and misleading and highly prejudicial that we have ignored the other points which arise on this record as to the reversal, and shall limit ourselves to a discussion of the violation of these two instructions. Both are manifestly and the giving of each is itself, we submit, requires a reversal of the judgment."

Plainly, as to instruction No. 2, argues for

reversal that the second clause thereof is erroneous, which in:

"2. That plaintiff, directly or indirectly, either personally or by agents did not take any part in the alleged burglary."

The instruction as a whole instructed the jury that there were three essential things which he must prove before he could render a verdict. They were:

"1. That plaintiff actually sustained a loss of property on February 22, 1932."

"2. As above recited."

"3. That there were marks of felonious entry upon the plaintiff's premises; that the marks were made by the burglar, and the taking of the same actually preceded or was simultaneous with the burglary, and was merely placed upon the premises after the removal of the goods from the premises of the plaintiff."

And these facts, the jury were instructed, must be proven by the plaintiff by a preponderance of the evidence.

It is our opinion that this instruction was without

error, because, as it did, upon the plaintiff the burden of proving these facts necessary to be proved under the terms of the verdict. It is plaintiff's contention that

burden of proof thus imposed upon plaintiff by instruction number 2 was erroneous, and that the burden rested upon the defendant to prove as a matter of its defense. By the contract, viz., the policy of insurance in suit, the burden of making such proof rested on the plaintiff, as a condition precedent to his right of recovery as hereinabove stated.

As to instruction number 18 plaintiff complains that it is not supported by any such evidence in the record. To a limited extent that may be true, but there is ample evidence in the record from which the inference may rightfully be drawn that the goods were removed not by burglars or through a felonious entry into the store, but by plaintiff or someone else in the store in his service. All of the circumstances in the evidence considered, the jury might find that plaintiff's goods were removed from his store with his knowledge or tacit acquiescence.

And further plaintiff urges that instruction number 18 is bad because it does not confine the jury to the evidence received on the trial, but enables them to speculate with regard to their finding as to the implication of any employee, servant or business associate of the plaintiff in the burglary. These instructions, as a whole, proceed upon the declared principle of law that before plaintiff can recover he must prove his case by a preponderance or greater weight of the evidence. This principle of law is stated in several instructions given and proffered by both parties. It was unnecessary to reiterate this axiomatic principle in every instruction. The instructions must be considered as a whole and considered together and not separately. When so read

burden of proof is imposed upon plaintiff by instruction number 2 and evidence, and that the burden rested upon the defendant to prove as a matter of fact. By the contract, viz., the policy of insurance in suit, the burden of making such proof rested on the plaintiff, as a condition precedent to his right of recovery as hereinbefore stated.

As to instruction number 10 plaintiff complains that it is not supported by any such evidence in the record. To a limited extent that may be true, but there is ample evidence in the record from which the inference may rightly be drawn that the goods were removed not by plaintiff or through a felonious entry into the store, but by plaintiff or through a felonious entry into the store. All of the circumstances in the evidence considered, the jury might find that defendant's goods were removed from the store by his knowledge or tacit acquiescence.

And further plaintiff urges that instruction number 10 is not correct in that it does not contain the fact that the goods were removed from the store by plaintiff or through a felonious entry into the store. It is not necessary to repeat this automatic principle in every instruction. The instructions must be considered as a whole and considered together and not separately. When so read these instructions, as a whole, proceed upon the declared principle of law that before plaintiff can recover he must prove his case by a preponderance of greater weight of the evidence. This principle of law is stated in several instructions given and proffered by both parties. It was unnecessary to repeat this automatic principle in every instruction. The instructions must be considered as a whole and considered together and not separately. When so read

and considered we find that the jury were instructed that the recovery of plaintiff must find support in a preponderance of the evidence heard by them and sanctioned by the court, either expressly or by implication. On this point we cannot say that the jury were misdirected by any instruction given them. We think that there was sufficient evidence in the record to warrant the court in giving instruction number 18. There was evidence that the door of the store was crashed in at a time when the goods had theretofore been removed from the store. The testimony of Reninger and of the policeman demonstrate that sufficient time did not elapse after the crash and before the arrival of the A.D.T. men, the plaintiff, policemen and others to permit of the removal of the goods, which plaintiff claims he lost as the result of the burglary. It is our opinion that the jury were fully instructed at the instance of both parties correctly as to the law applicable to the facts in evidence, and that there is no error discoverable in the giving of instructions numbers 2 and 18.

We are satisfied that the trial was fair; that there was neither error in procedure or in the giving of the instructions complained of, and for these reasons the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, P. J. AND WILSON, J. CONCUR.

and considered we find that the jury were instructed that the recovery of plaintiff must find support in a preponderance of the evidence heard by them and sanctioned by the court. either expressly or by implication. On this point we cannot say that the jury were misdirected by any instruction given them. We think that there was sufficient evidence in the record to warrant the court in giving instruction number 15. There was evidence that the door of the store was unlocked in at a time when the goods had theretofore been removed from the store. The testimony of Kennedy and of the witnesses demonstrate that sufficient time did not elapse after the search and before the arrival of the A.T. men, the plaintiff, witnesses and others to permit of the removal of the goods, which plaintiff claims he lost as the result of the burglary. It is our opinion that the jury were fairly instructed as to the instances of both parties respectively as to the law applicable to the facts in evidence, and that there is no error discoverable in the giving of instructions numbers 5 and 15.

We are satisfied that the trial was fair; that there was neither error in procedure or in the giving of the instructions complained of, and for those reasons the judgment of the Circuit Court is affirmed.

TAYLOR, J. J. AND WILSON, J. CONCUR.

FRANCIS A. HURLEY,

Appellee,

v.

CITY OF CHICAGO,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed March 29, 1928.

MR. JUSTICE HOLBOM delivered the opinion of the court.

This is an undefended appeal and from a reading of the record we are inclined to the opinion that plaintiff and his counsel concluded that the judgment appealed from is in every particular without merit.

In the plaintiff's statement of claim it is stated that his claim is for salary as ward superintendent of streets in Chicago from the 12th day of December, 1919, to the 30th day of June, 1925, at the rate of \$250 per month, and from the first day of July, 1925 until the 12th day of December, 1926, at the rate of \$265 per month, making a total of \$21,250; that said salary is due plaintiff by reason of the fact that on said 12th day of December, 1919, he was unlawfully discharged from the services of defendant, and afterwards on the 12th day of December, 1926, was ordered reinstated to his position as ward superintendent, under and by virtue of a writ of mandamus issued by the Superior Court of Cook County in the suit of Francis A.

APPELLATE COURT
OF CHICAGO

Opinion filed March 29, 1938.

MR. JUSTICE HANCOCK delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court of Cook County, Illinois, entered on the 12th day of December, 1937, in favor of the plaintiff, and his counsel concluded that the judgment appealed from is in every way correct without merit.

In the plaintiff's statement of claim it is stated that his claim is for salary as ward superintendent of streets in Chicago from the 15th day of December, 1937, to the 30th day of June, 1938, at the rate of \$325 per month, and from the 1st day of July, 1938, until the 15th day of December, 1938, at the rate of \$350 per month, making a total of \$31,250; that said salary is due plaintiff by reason of the fact that on said 15th day of December, 1937, he was unlawfully discharged from the service of defendant, and afterwards on the 15th day of December, 1938, was ordered reinstated to his position as ward superintendent, under and by virtue of a writ of mandamus issued by the Superior Court of Cook County in the suit of Francis A.

Hurley v. City of Chicago, et al, Gen. No. 433588; that defendant, although often requested to pay, has failed so to do. The statement of claim was verified by the affidavit of plaintiff. The judgment in this appeal was entered on April 9, 1927 for \$10,630 against the City of Chicago without evidence and solely upon the stipulation of the then corporation counsel and the attorney for the plaintiff, which stipulation is in the following words:

"It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys, that the court may enter a finding in favor of the plaintiff and against the defendant in the sum of Ten Thousand Six Hundred Thirty (\$10,630.00) dollars and costs of suit, and that judgment may be entered on the finding."

On May 9, 1927, within thirty days of the date of the judgment, defendant filed its verified motion to vacate the judgment, and also filed its affidavit of meritorious defense to the matters set forth in plaintiff's statement of claim. The record shows that since the entry of the judgment and the making of the motion to vacate it, there was a change in the incumbents of the office of corporation counsel, when the Dever administration went out and the Thompson administration came in.

On June 8, 1927, the motion of the City to vacate the judgment and for leave to file its affidavit of merits was denied, and this appeal was prayed and perfected by the City of Chicago.

The city assigns for error and argues for reversal to the effect that every action and stipulation, which eventuat

Hunter v. City of Chicago, No. 123456; that

detendant, although often requested to pay, has failed to do so. The statement of claim was verified by the affidavit of plaintiff. The judgment in this appeal was entered on April 9, 1927 for \$10,000 against the City of Chicago with-
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corporation counsel and the attorney for the defendant,
which stipulation is in the following words:

"It is hereby stipulated and agreed by and
between the parties hereto by their respective
attorneys, that the court may enter a finding in
favor of the plaintiff and against the defendant
in the sum of ten thousand six hundred thirty
(\$10,630.00) dollars and costs of suit, and that
judgment may be entered on the finding."

On May 9, 1927, within thirty days of the date
of the judgment, detendant filed its verified motion to
vacate the judgment, and also filed its affidavit of
stipulation between the parties hereto in which it
statement of claim. The record shows that since the entry
of the judgment and the making of the motion to vacate it,
there was a change in the membership of the office of
corporation counsel, when the former administration went
out and the Thompson administration came in.

On June 5, 1927, the motion of the City to
vacate the judgment and for leave to file its affidavit
of merits was denied, and this appeal was prayed and per-
formed by the City of Chicago.

The city assigns for error and argues for reversal
to the effect that every action and stipulation, which constitutes

in the denial by the court of the City's motion to vacate the judgment, were tainted with error. It also invokes the doctrine of laches as a defense to plaintiff's claim, and contends that every averment in defendant's motion to vacate the judgment, and also that every statement of fact contained in its affidavit of merits filed with the motion, stands confessed, because plaintiff made no answer either to the motion or interposed any affidavit in denial of the statements of fact appearing in the motion and affidavit filed in support of it. Among other averments in defendant's motion is this: that during the entire period beginning on the 12th day of December, 1919, to the 12th day of December, 1926 the duties of the position of ward superintendent of streets of the City of Chicago were performed by incumbents de facto of said position and that all moneys appropriated or provided by the City Council of the City of Chicago as salary and compensation for said position of ward superintendent of streets during all of said period of time, to-wit: from said December 12, 1919 to December 12, 1926, were paid in good faith to the incumbents de facto of said position during all the time for which plaintiff claims salary, and that therefore defendant is not liable for the sum claimed by plaintiff, or any part thereof, and that said claim, if any said plaintiff had, was barred by laches continuing for more than seven years at the time of the commencement of this suit.

In the first place plaintiff's statement of claim did not set forth a cause of action, for one reason among others, that it appeared from the averments of said statement

in the denial by the court of the City's motion to vacate the judgment, were tainted with error. It also involves the doctrine of issues as a defense to plaintiff's claim, and contends that every statement in defendant's motion to vacate the judgment, and also that every statement of fact contained in the affidavit of notice filed with the motion, stands controverted, because plaintiff made no answer, whether to the motion or in response to plaintiff's denial of the statements of fact appearing in the motion and affidavit filed in support of it. Among other statements in defendant's motion in this regard during the entire period beginning on the 15th day of December, 1915, on the 15th day of December, 1916 the duties of the position of ward superintendent of streets of the City of Chicago were performed by incumbents as listed of said position and that all money appropriated or provided by the City Council of the City of Chicago as salary and compensation for said position of ward superintendent of streets during all of said period of time, to-wit: from said December 15, 1915 to December 15, 1916, were paid in good faith to the incumbents as listed of said position during all the time for which plaintiff claims salary, and that therefore defendant is not liable for the sum claimed by plaintiff, or any part thereof, and that said claim, if any said plaintiff had, was barred by lapse of time more than seven years at the time of the commencement of this suit.

In the first place plaintiff's statement of claim did not set forth a cause of action, for one reason among others, that it appeared from the averments of said statement

that this suit was not instituted until more than seven years after the accruing of plaintiff's cause of action. Therefore laches in bringing the suit is imputable to plaintiff from the averments in his statement of claim, and as such statement did not state a cause of action the stipulation of the corporation counsel consenting to the entry of a judgment did not operate to supply this defect in plaintiff's pleading. Furthermore neither did the stipulation of counsel vest the court with jurisdiction de hors the averments of the statement of claim. The court therefore was at the time of the entry of the judgment without jurisdiction so to do.

Kenyon v. City of Chicago, 135 Ill. App. 227, is quite in point on this branch of the case. In the Kenyon case the court follows City of Chicago v. Luthardt, 191 Ill. 516, where it is said:

"Appellee, then, being a municipal officer and prevented from the performance of the duties of his office by the acts of the chief of police and the common council of the city, and it not appearing from this record that the appropriation for the salary of his office had been paid to any one performing the duties of the office, appellee is entitled to recover.' Non constat if the contrary had been the fact, and the salary had been paid to one who had performed the duties of the office, the right of Luthardt to recover the salary might have been doubtful."

In the case at bar it stands admitted that the salary claimed by plaintiff was paid to others. In the Kenyon case, supra, the writer of this opinion said:

that this suit was not instituted until more than seven years after the occurrence of plaintiff's cause of action. Therefore, in bringing the suit is impossible for plaintiff from the occurrence in his statement of claim, and an affidavit did not state a cause of action to the satisfaction of the corporation counsel consenting to the entry of a judgment. It was not until the entry of a judgment in plaintiff's pleading, furthermore, neither did the corporation of counsel want the court with jurisdiction in this case. The statement of the statement of claim, the court should have been at the time of the entry of the judgment without jurisdiction so to do.

Kempson v. City of Chicago, 133 Ill. App. 327, is

quite in point on this branch of the case. In the Kempson case the court follows City of Chicago v. Lombard, 131 Ill. 510, where it is said:

"Appellee, then, being a municipal officer and prevented from the performance of the duties of his office by the acts of the city of Chicago, and the common council of the city, and it not appearing from this record that the corporation for the salary of his office had been paid to any one performing the duties of the office, appellee is entitled to recover." How possible if the salary had been the fact, and the salary had been paid to one who had performed the duties of the office, the right of Lombard to recover the salary might have been doubtful."

In the case at bar it is again stated that the salary claimed by plaintiff was paid to others. In the Kempson case, again, the writer of this opinion said:

"During the time for which plaintiff claims salary he was not in the employ of defendant, and did no work and performed no service entitling him to compensation. On the reasonable theory that he who demands pay for his service must perform the service for which he demands payment, there can be no such thing as constructive service. The work of a department of a municipality must be done by the actual labor of the servant. Machinery will neither get into motion continue in motion nor cease its motion without the active interposition of the mechanic. Some one did the work, formerly the duty of plaintiff, during the time he seeks pay without work, and that some one was necessarily requited financially for his toil. Unless there is some very cogent reason, not disclosed by the record, why he who works not should be paid for the work done by another, and the municipality compelled to pay twice for one service, plaintiff cannot maintain his claim. * * * His present demand for pay without service does not commend itself to our sense of justice. Plaintiff is clearly guilty of laches in waiting nearly two years before disputing the validity of his discharge or making any effort by suit to test his rights in the matter."

In City of Chicago v. Condell, 224 Ill. 595, delay of one year and a half in starting suit was held to be laches. In McAlevy v. City of Chicago, 207 Ill. App. 350, a delay of fifteen months was held to be laches.

It stands confessed by plaintiff's statement of claim that his delay in commencing action exceeded a period of seven years.

In Foss v. Peoples Gas Light & Coke Co., 293 Ill. 94, the court said:

"Laches is a defense which may be taken advantage of by demurrer if it appears on the face of the bill or a defendant may claim the benefit of it by his answer. In this case laches appeared on the face of the bill and the general demurrer went to the merits of that defense. The court sustained the defense and dismissed the bill on the merits for want of equity."

"During the time for which plaintiff claims salary he was not in the employ of defendant, and did not work and performed no services entitling him to compensation. On the reasonable theory that he who demands pay for his services must perform the services for which he demands payment, there can be no question that as defendant's services, the work of a department of a municipality must be done by the actual labor of the servant. Accordingly, plaintiff's action continues in action not cause the action without the active investigation of the municipality. Some one did the work, formerly the duty of plaintiff, during the time he was working without work, and that some one was necessarily required financially for his toil. Unless there is some very cogent reason, established by the record, why he who works should be paid for the work done by another, and the municipality compelled to pay twice for one service, plaintiff cannot maintain this claim. His present demand for pay without service does not command itself in our sense of justice. Plaintiff is clearly guilty of laches in waiting nearly two years before disputing the validity of his discharge or making any effort by suit to test his rights in the matter."

In re Chicago v. Council, 224 Ill. 592.

delay of one year and a half in starting suit was held to be laches. In Chicago v. City of Chicago, 227 Ill. App. 350, a delay of fifteen months was held to be laches.

It stands confessed by plaintiff's statement of claim that his delay in commencing action exceeded a period of seven years.

In re Chicago v. Council, 224 Ill. 592.

54, the court said:

"Laches is a defense which may be taken advantage of by defendant if it appears on the face of the bill or a defendant may raise the question of it by his answer. In this case laches appeared on the face of the bill and the general demurrer went to the merits of the defense. The court sustained the defense and dismissed the bill on the merits for want of equity."

As laches appears from the averments of the plaintiff's statement of claim in the case at bar, it might have been advantaged of in the trial court and consequently is preserved for decision in this court.

It was an abuse by the trial judge of that judicial discretion, which the law imposes on a judge at nisi prius, to deny the motion of the City to vacate the judgment and be let in to defend upon the merits. It was the duty of the corporation counsel to defend the city's interests in the suit and not to compromise, and with the aid of the trial court, to stipulate that a judgment for one-half of the plaintiff's claim be entered. A corporation counsel, by virtue of his office, has no power to stipulate that the funds of the city shall be paid out on an unlawful claim. The stipulation of the corporation counsel without further proof conferred no power upon the trial court to enter the judgment found in the record.

In Hittell v. City of Chicago, 337 Ill. 443, the court quoting from People v. Schmidt, 281 Ill. 211, said:

"The principal question to be decided here is whether the payment of a salary provided for an office or position to a de facto employee or officer in said position is a good defense to a claim against the public corporation making such payment in an action against such corporation by a de jure officer or employee to recover such salary.' The court held that the answer stated a good defense, so that while this case is cited and relied upon by defendant in error the decision of the court is contrary to his contention here. People v. Burdett, 263 Ill. 124, is a similar case, and it was there said: 'One of the defenses interposed by appellants is that a de jure officer or employee who has been for a time wrongfully prevented from discharging the duties of his office cannot recover from the State the salary for such time when it has been paid to a de facto officer who has discharged

...the ... of the ...

been changed in the final count and consequently in the

It was an issue by the trial judge at that judicial discretion, which the law imposes on a judge at that time, to say whether or not it is to be decided by the jury or by the judge. It was the duty of the corporation counsel to defend the city's interests in the case and not to compromise, and with the aid of the trial judge, to stipulate that a judgment for one-half of the plaintiff's claim be entered. A corporation counsel, by virtue of his office, has no power to stipulate that the funds of the city shall be paid out on an unlawful claim. The stipulation of the corporation counsel without further consent would enter no power upon the trial court to enter the judgment found in the record.

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The principal question to be decided here is whether the payment of a salary provided for in an office or position to a de facto employee or officer in said position is a legal obligation of the public corporation making such payment in an action against such corporation by a de jure officer or employee to recover such salary. The court said that the answer stated is of course, no, but that this was in error and should be corrected, so that the law is stated as follows: "If the court is satisfied by the evidence that the salary provided for in an office or position to a de facto employee or officer in said position is a legal obligation of the public corporation making such payment in an action against such corporation by a de jure officer or employee to recover such salary, the court shall award such salary."

the duties of the position during the period of time the de jure officer was prevented from discharging them. This was held to be a good defense in People v. Schmidt, 281 Ill. 211, where the precise question here raised was passed upon and where it was held the de jure officer could not in such case recover. Any contrary holding in People v. Coffin, 279 Ill. 401, is overruled. * * * In the instant case, during all the time for which the compensation in question is claimed, a person other than plaintiff was the de facto chief street engineer for defendant (People v. Schmidt, *supra*), and received the compensation for his services. Plaintiff had not at that time been adjudicated the de jure chief street engineer. Payment to such de facto employee was a good defense to this suit, and the circuit and Appellate Courts erred in holding otherwise."

To a like effect is O'Connor v. City of Chicago, 327 ibid., 586.

For the reasons above stated the judgment of the Municipal Court is reversed, and as no cause of action is stated in plaintiff's statement of claim, the cause is not remanded.

REVERSED WITHOUT REMANDING.

TAYLOR, P. J. AND WILSON, J. CONCUR.

the duties of the position during the period
of time the duty station was transferred from
this was held to be a good
reason in law. Hammer, 201 Ill. 211.
where the question here raised was
whether it was held the duty
station could not in such cases recover.
It is held in People v. Dettin, 275 Ill. 407.
In the instant case, during
all the time when the compensation in question
is claimed, a person other than plaintiff was the
person who was employed for defendant
at People v. Dettin, 275 Ill. 407. and received the same
compensation for his services. Plaintiff had not
at that time been adjudicated the sole chief
employee. Payment to such an employee
was a good defense to this suit, and the circuit
and appellate courts acted in holding otherwise.

It is held that the effect is to

REVERSED.

For the reasons above stated the judgment of the
circuit court is reversed, and no award of costs is
made in plaintiff's statement of claim, the case is
not remanded.

REVERSED WITHOUT REMAND.

REVERSED.

A. J. PANAGAKOS, doing business as
A. J. PANAGAKOS & CO.,

Appellee,

v.

GEORGE J. COOKE COMPANY,
a corporation,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed March 29, 1928.

MR. JUSTICE HOLCOM delivered the opinion of
the court.

This is an action brought by plaintiff against
the defendant for damage to 227 barrels of apples, which
defendant accepted for storage in its cold storage warehouse.
Plaintiff avers in his statement of claim that the apples
were frozen as the result of the negligence of defendant, and
that he suffered damage as the result of such freezing. It
seems that these 227 barrels of apples were a part of the
580 barrels of apples which plaintiff stored with the defend-
ant in the fall of 1923. Defendant denied that the apples
were in good condition when received, and also denied that
the apples became frozen as a result of any negligence of
defendant.

There was a trial before court and jury with a
resulting verdict for the plaintiff and against the defend-
ant, and damages were assessed at \$955.99 by that verdict.
After the overruling of the customary motions, the court
entered judgment against defendant, who brings the record

A. J. PARADISE, 1010 Business St.
A. J. PARADISE & CO.

1010 Business St.

MUNICIPAL COURT
OF CHICAGO

THE COURT

Applicant

Opinion filed March 29, 1938.

MR. JUSTICE HOLLOMAN delivered the opinion of

the court.

This is an action brought by plaintiff against

the defendant for damage to 327 barrels of apples, which

defendant accepted for storage in its cold storage warehouse.

Plaintiff avers in his statement of claim that the apples

were frozen as the result of the negligence of defendant, and

that he suffered damage as the result of such freezing. It

seems that these 327 barrels of apples were a part of the

580 barrels of apples which plaintiff stored with the defendant

and in the fall of 1935. Defendant denies that the apples

were in good condition when received, and also denies that

the apples became frozen as a result of any negligence of

defendant.

There was a trial before court and jury with a

resulting verdict for the plaintiff and against the defendant

and damages were assessed at \$327.00 by that verdict.

After the overruling of the numerous motions, the court

entered judgment against defendant, who brings the record

here for our review.

Defendant assigns for error and argues for reversal the denial of its motion at the close of all the evidence to direct a verdict for the defendant, and also that the plaintiff did not prove the negligence alleged against it.

The questions here involved are largely of fact and these questions have been twice submitted to a jury, each one finding in favor of plaintiff and against defendant. The verdicts are in form and effect alike. The motion of defendant for a new trial on the first verdict was allowed by the court, but the result of the second trial was the same as that in the first.

An examination of all the evidence demonstrates that the cause should have been submitted to the jury to determine the questions of fact arising from the testimony of both the parties. The condition of the proofs at the time the motion to instruct for defendant was made, was such, that no question of law was presented for the court's decision, and the court in the then condition of the proofs could not say as a matter of law that plaintiff had not made such a case by his proofs, which, standing alone, were not sufficient to support a verdict in his favor. As the case stood at the time defendant made its motion to instruct a verdict, the probative force of the evidence was the province of the jury to determine.

As said in Sheppelman v. People, 134 Ill. App. 556,

here for our review.

Defendant assigns for error and argues for reversal

the denial of his motion at the close of all the evidence

as himself a verdict for the defendant, and also that the

plaintiff did not prove the negligence alleged against it.

The questions here involved are largely of fact

and these questions have been twice submitted to a jury.

each one finding in favor of plaintiff and against defendant.

The verdicts are in form and effect alike. The motion is

granted for a new trial on the first verdict was allowed

by the court, but the result of the second trial was the

same as that in the first.

An examination of all the evidence demonstrates

that the issues should have been submitted to the jury so

that the questions of fact arising from the testimony

of both the parties. The condition of the proofs at the

time the motion to instruct for defendant was made, was

such that no question of law was presented for the court's

decision, and the court in the then condition of the proofs

would not say as a matter of law that plaintiff had not

made out a case by his proofs, which, standing alone, were

not sufficient to support a verdict in his favor. As the

case stood at the time defendant made his motion to instruct

a verdict, the relative force of the evidence was the same

at the jury's determination.

As said in Wheeler v. Taylor, 134 Ill. App. 533.

"The force and weight to be given to the testimony of the respective witnesses was a matter to be determined by the jury and with which the court could not interfere." Citing Chicago & A.R. Co. v. Robinson, 106 Ill. 145; Atchison, T. & S. I.R. Co. v. Feehan, 149 Ill. 203; Indiana, I. & I.R. Co. v. Otstat, 212 Ill. 429.

Then plaintiff proved that defendant received the apples in question in good condition, and that thereafter the apples were delivered in a damaged condition, he made a prima facie case entitling him to recover such damages as the evidence showed he had sustained, and cast upon the defendant the burden of proving that it was free from the negligence alleged and proven by plaintiff. The proof of plaintiff appeals to us as it undoubtedly did to the jury, as being highly satisfactory. The condition of the apples on the trees in the orchard at Blue Springs, Missouri, and also their condition when picked, packed and shipped, as well as at the time they were received by defendant, was proved by eye witnesses to these several steps in their progress from the orchard to defendant's warehouse. Defendant, to meet this proof, introduced evidence showing the construction of the warehouse and the cooling system maintained therein, and other witnesses testified as to the temperature maintained in the warehouse in the compartment where the apples were stored. There is no evidence on the part of the defendant contradicting that of plaintiff as to the apples being frozen, or to the effect that the apples were not frozen. All the evidence considered affirmatively supports the verdict of the jury.

"The boxes and weight to be given to the testimony of the respective witnesses was a matter to be determined by the jury and with which the court could not interfere." 100 Ill. 111.

When plaintiff proved that defendant received the apples in question in good condition, and that thereafter the apples were delivered in a damaged condition, he made a prima facie case entitling him to recover such damages as the evidence showed he had sustained, and cast upon the defendant the burden of proving that it was free from the negligence alleged and proven by plaintiff. The proof of plaintiff appears to us as it undoubtedly did to the jury, as being highly satisfactory. The condition of the apples on the trees in the orchard at Elm Springs, Missouri, and also their condition when picked, packed and shipped, as well as at the time they were received by defendant, was proved by eye witnesses to these several steps in their progress from the orchard to defendant's warehouse. Defendant, by most this proof, introduced evidence showing the condition of the warehouse and the cooling system maintained therein, and other witnesses testified as to the temperature maintained in the warehouse in the compartment where the apples were stored. There is no evidence on the part of the defendant contradicting that of plaintiff as to the apples being frozen, or to the effect that the apples were not frozen. All the evidence considered collectively supports the verdict of the jury.

is cast upon a warehouse man for any loss or injury to property in storage caused by the warehouse man's failure to exercise such care as a reasonably careful owner of similar property would exercise; and when a warehouse man receives property in good condition and returns it in bad condition, the presumption arises that the damage was due to the warehouse man's negligence, and this imposes upon the warehouse man the burden of rebutting such presumption by competent proof. This we think the jury were warranted in finding the defendant failed to do.

The law does not impose upon the plaintiff the burden of proving a specific act of negligence, but as above noted, when a plaintiff proves delivery to the warehouse of property in good condition and it is returned in a damaged condition, a prima facie case of liability against the warehouse man is established.

After two juries have found the facts in a case in the same way a court of review would not be justified in reversing a judgment on the last verdict unless it could say from weighing all of the evidence that the finding of the jury in the instant case was contrary to its probative force. A painstaking perusal of all the evidence in the record constrains us to concur in the conclusions to which the jury arrived. It was peculiarly the province of the jury to determine whether the defendant's proofs rebutted the legal presumption of negligence arising from the facts of the receipt of the apples in good condition and their return in a frozen condition. Chicago City Ry. Co. v. Eick,

is cast upon a warehouse man for any loss or injury to property in storage caused by the warehouse man's failure to exercise such care as a reasonably careful owner of similar property would exercise; and when a warehouse man receives property in good condition and returns it in bad condition, the presumption arises that the damage was due to the warehouse man's negligence, and this imposes upon the warehouse man the burden of rebutting such presumption by competent proof. This is what the jury were warranted in finding the defendant failed to do.

The law does not impose upon the plaintiff the burden of proving a specific act of negligence, but on the other hand, when a plaintiff proves delivery to the warehouse of property in good condition and it is returned in a damaged condition, a prima facie case of liability against the warehouse man is established.

After two juries have found the facts in a case in the same way a court of review would not be justified in reversing a judgment on the fact verdict unless it could say from weighing all of the evidence that the finding of the jury in the instant case was contrary to its probative force. A painstaking re-examination of all the evidence in the record convinces us so much in the conclusion to which the jury arrived, it was peculiarly the province of the jury to determine whether the defendant's proofs rebutted the legal presumption of negligence arising from the facts of the receipt of the apples in good condition and their return in a broken condition. Chicago City Ry. Co. v. Rice.

111 Ill. App. 459.

The municipal Court did not err in submitting the cause to the jury, and the defendant failed to rebut the presumption of negligence attributable to it in the circumstances above recited. Therefore the judgment is affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

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The Municipal Court did not see in submitting
the case to the jury, and the defendant failed to raise
the question of negligence attributable to it in the
circumstances of the case. The defendant is
liable.

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320 - 32261

MAX ROSENBERG,

Appellee,

v.

FANNIE McCOMB,

Appellant.

243 I.A. 647

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed March 29, 1928.

MR. JUSTICE HOLCOM delivered the opinion of the court.

The action here is between landlord and tenant, and is in forcible detainer for possession of the premises forming a portion of 1025 West Madison street, Chicago. There was a trial before the Municipal Court and a finding by the trial judge that plaintiff was entitled to the possession of the premises in suit, and a judgment for possession entered upon such finding, and the defendant tenant brings the record to this court for our review.

Max Rosenberg, the plaintiff, sued defendant as assignee of the lessor in a lease of premises above set out to the defendant Fannie McComb. The complaint was in the usual form and the necessary notices for possession were given by plaintiff to defendant. Possession was claimed by the plaintiff for breach of the covenant in the lease, which devised the premises for occupancy as a dwelling and that defendant used the same as a rooming house contrary to that covenant.

Defendant urges for reversal that the action was improperly brought in the name of the plaintiff as assignee of the lessor, and that there had been a waiver of the

248 I.A. 647

UNITED STATES COURT
OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILL.

Appellant,

JAMES H. HENSON,

Appellee.

Opinion filed March 28, 1938.

MR. JUSTICE HOLMES delivered the opinion of the

The action here is between landlord and tenant, and is in forcible detainer for possession of the premises forming a portion of 1035 West Madison Street, Chicago. There was a trial before the Municipal Court and a finding by the jury that plaintiff was entitled to the possession of the premises in suit, and a judgment for possession entered upon such finding, and the defendant sought to bring the record to this court for our review.

Max Rosenberg, the plaintiff, and defendant as co-tenants of the house in a lease of premises above set out to the defendant James Henson. The complaint was in the usual form and the necessary notice for possession was given by plaintiff to defendant. Possession was claimed by the plaintiff for breach of the covenant in the lease, which provided the premises for occupancy as a dwelling and that defendant used the same as a rooming house contrary to that covenant. Defendant urges for reversal that the action was improperly brought in the name of the plaintiff as assignee of the lease, and that there had been a waiver of the

restrictive covenant to occupy the demised premises as a dwelling.

As to the first point that plaintiff, as assignee of the lessor, has no right to maintain the action in his own name, we cannot agree with this contention. The interest of the lessor in the lease was assignable and section 14 of the Landlord and Tenant Act, chapter 80 R.S. gives that right. It provides that the grantee of any demised premises, tenements, rents or of the reversion thereof, the assignees of the lessors of any demise and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise for the non-performance of any agreement in the lease or for the recovery of any rent, or other cause of forfeiture as their grantor or lessor might have had if such reversion had remained in such lessor.

The foregoing section is a re-enactment of the 32d of Henry VIII, chapter 34, section 1. In Fisher v. Deering, 60 I., l. 114, it was held that the English statute, supra, was in force in this state. In the case supra, it was held that the general assembly of the state adopted the common law and all British statutes with a few exceptions in aid of the common law, so far as they are applicable to our condition, passed prior to the fourth year of James the First, as the rule of decision until altered or repealed, and that the 32d of Henry the Eighth was adopted prior to that time and is applicable to our condition and is in force, and that the legislature in adopting it, will be presumed to have intended to adopt the

restorative covenant to secure the desired premises as a
condition.

As to the first point, it is plain, as we have seen
of the lessor, and no right to maintain the action in his
own name, we cannot agree with this contention. The interest
of the lessor in the lease was assignable and section 14
of the Landlord and Tenant Act, chapter 30 R.S. gives that
right. It provides that the grantee of any demise premises,
tenements, houses or of the reversion thereof, the heirs
of the lessor of any demise and the heirs and personal re-
presentatives of the lessor, grantee or assignee, shall have
the same remedy, entry, action or otherwise for the
non-performance of any agreement in the lease or for the
recovery of any rent, or other sum of money as their
grantor or lessor might have had if such reversion had remained
in such lessor.

The foregoing section is a re-enactment of the 32d
of Henry VIII, chapter 34, section 1. In Fisher v. Porter,
20 L.R. 114, it was held that the English statute, quod, was
in force in this state. In the case quod, it was held that
the general assembly of the state adopted the common law and
all English statutes with a few exceptions in aid of the com-
mon law, so far as they are applicable to our condition, passed
prior to the fourth year of James the first, as the rule of
decision until altered or repealed, and that the 32d of Henry
the eighth was enacted prior to that time and is applicable to
our condition and is in force, and that the legislature in
enacting it, will be presumed to have intended to adopt the

judicial construction that had been placed upon that statute by the English courts. Purvis v. Shuman, 373 ibid. 286).

There is no evidence shown in the abstract as to the payment of rent by defendant to plaintiff or his assignor. Therefore the question of whether or not the receipt of rent was a waiver of the breached covenant is not presented to us for decision.

The only evidence found in the abstract on the part of defendant was an examination of her by the court in which the court asked her the following question:

"The Court: Did you sublet the premises to boarders and roomers?

The Witness: I have at all times, and do so at this time."

If there was no other evidence in the record on this point defendant herself stands to have confessed her breach of the covenant of the lease to use the premises for dwelling purposes.

Defendant invokes Rule 22 of the Municipal Court. We do not take judicial notice of the rules of the Municipal Court. To preserve such rule for our review it must be offered and received in evidence on the trial. Sixby v. C.C.Ry.Co. 260 Ill. 478).

Defendant was in court and examined by the court, as above set out, as a witness in her own behalf. After she left the court voluntarily, counsel requested the court to wait until he could bring her back for additional examination. This the court refused to do. This was not error. It was the

judicial construction that had been placed upon that statute by the English courts. Forster v. Draper, 278 (1893).

There is no evidence shown in the statement as to the payment of rent by defendant to plaintiff or his assignee. Therefore the question of whether or not the receipt of rent was a waiver of the breached covenant is not presented as an issue for decision.

The only evidence found in the statement on the part of defendant was an examination of her by the court in which the court asked her the following question:

"The Court: Did you subject the premises to mortgage at any time? The witness: I have at all times, and do so at this time."

If there was no other evidence in the record on this point defendant herself stands to have contested her claim of the ownership of the issue to use the premises for dwelling purposes.

Defendant invokes Rule 32 of the Municipal Court. We do not take judicial notice of the rules of the Municipal Court. To preserve such rule for our review it must be

offered and received in evidence on the trial. Shipley v. Shipley, 200 Ill. 478.

Defendant was in court and examined by the court, as above set out, as a witness in her own behalf. After she had been so examined, counsel requested the court to wait until he could bring her back for additional examination. This the court refused to do. This was not error. It was the

duty of the defendant to stay in court during the trial of the case, and it was not the province of the court to await her return, because she had voluntarily left the court, her case and her counsel.

The abstract of record is deficient in every material particular. Among other defects the lease in evidence is not abstracted; the "alleged order of court" approving an agreed statement of facts nowhere appears in the abstract, so we are unable to tell what such statement of fact was, or whether there was any such statement agreed upon. The abstract is the pleading of the parties and while the court will not examine the record to reverse, it will search the record to affirm regardless of the abstract.

(McGovern v. City of Chicago, 209 Ill. App. 139). The abstract of record filed falls far short of complying with Rule 18 of this court regarding abstracts, which provides inter alia that in all cases a party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, therein referring to the appropriate pages of the record by numerals on the margin, etc. It shall show in condensed form the pleadings necessary to present any question raised thereon and the judgment. The evidence shall be set forth in narrative form and the abstract must be sufficient to present fully every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision.

For the failure of counsel to abstract the record in accordance with the rule, we would be justified in affirming

any of the defendant to stay in court during the trial of the case, and it was not the province of the court to send her return, because she had voluntarily left the court, her case and her counsel.

The statement of record is sufficient in every material particular. Among other defects the issue in controversy is not abstracted; the alleged order of court appointing an agreed statement of facts as where appears in the abstract, so we are unable to tell what such statement of facts was, or whether there was any such statement agreed upon. The abstract is the pleading of the parties and while the court will not examine the record to reverse, it will search the record to affirm the judgment of the court. Lawrence v. City of Chicago, 308 Ill. App. 130. The abstract of record filed fails for want of complying with Rule 18 of this court regarding abstracts, which provides inter alia that in all cases a party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, therein referring to the appropriate pages of the record by number on the margin, etc. It shall show in condensed form the pleadings necessary to present any question raised thereon and the judgment. The evidence shall be set forth in narrative form and the abstract must be sufficient to present fully every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision.

For the failure of counsel to abstract the record in accordance with the rule, we would be justified in affirming

the judgment for the imperfections in the abstract.

A painstaking search of the record and of the briefs fails to disclose any meritorious defense on the facts; neither does there appear to be any defense of law to the action.

There is no error apparent in the record of the Municipal Court, and its judgment is therefore affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

5th & 7th
10-17-17
4-12-18

SECRET

the interest for the information in the records.
a continuing search of the records and of the
which fails to disclose any notorious defense on the
facts; which were taken upon as in the defense of the
to the nation.
There is no other evidence in the records of
the defense which is the subject of the defense.

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the judgment for the imperfections in the abstract.

Counsel for defendant signed the abstract and his briefs "Francis J. Gariepy, Of the Legal Aid Bureau of the United Charities of Chicago" as well as "Attorney for Appellant". The Legal Aid Bureau of the United Charities of Chicago is not a party to this suit, and why counsel should inject it into the case, is not made to appear. The purpose of counsel in so signing himself is not disclosed to this court, and from the record we have been unable to discover. The case has no ear marks of charity for defendant, and the record is silent on that subject. To say the least it is in poor taste for counsel to inject after his own name "Of the Legal Aid Bureau of the United Charities of Chicago". Whether counsel is connected with that organization, or any of the multitudinous social service societies, is wholly immaterial, and in no ways helps the court in the decision of the case. It is a legal axiom that "the law is no respecter of persons."

A painstaking search of the record and of the briefs fails to disclose any meritorious defense on the facts; neither does there appear to be any defense of law to the action.

There is no error apparent in the record of the Municipal Court, and its judgment is therefore affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

the judgment for the impetuous in the absence.

(counsel) for defendant signed the verdict and his

entire "interest" in the case, the name of the

United States of America, as well as "interest" for defendant.

The judge in the case of the United States of America is

not a party to the case, and any counsel should inform it

into the case, it is not in the case. The purpose of counsel

is to inform the court in the case, and

from the records of the case, the court is able to discover. The case

has no other way of stating the case, and the records

is not in the case. It is not in the case, it is not

the case, it is not in the case, it is not in the case.

the name of the United States of America. The case

counsel is connected with that organization, or any of the

multitudinous social service activities, is wholly immaterial.

and in no way helps the court in the decision of the case.

It is a legal matter that the law is the subject of the case.

A preliminary search of the records and of the

records fails to disclose any connection between the facts;

neither does there appear to be any defense of law to the

case.

There is no error apparent in the record of the

criminal case, and the judgment is therefore affirmed.

APPROVED.

WILLIAM J. WILSON, U. S. DISTRICT JUDGE.

32464

MICHAEL SCHWAB,

Appellee,

v.

LORRAINE SCHAEFER, ET AL,

On appeal of
LORRAINE SCHAEFER,

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed March 29, 1928.

MR. JUSTICE HOLDEN delivered the opinion of
the court.

This is an appeal from an order appointing a
receiver in a creditor's bill filed by complainant against
defendants, entered on August 29, 1927. Defendant brings
the record here asking for a reversal of that order.

We do not intend to pass upon the merits of the
application but confine our decision to the want of a suffi-
cient affidavit supporting the bill.

The affidavit is made by one Henry M. Hagen, the
solicitor for the complainant. That affidavit is general
and contains no statement of any fact upon which the affiant
bases his belief, as agent of the complainant; that the
averments of the bill are true. The affiant, complainant's
solicitor, is not a party to the litigation except as solicitor
for the complainant, and is not by any averment of the bill
connected with or interested in the case, or any of the
matters or things averred to exist. If the affiant had been
a proper party to make the supporting affidavit, still the

U.S. DISTRICT COURT

1938

MICHAEL BROWN

Applicant

VERSUS

CIRCUIT COURT

DOOR NO. 1

IN RE: MICHAEL BROWN

Applicant

Opinion filed March 22, 1938.

JUSTICE HOLTON delivered the opinion of

the court. This is an appeal from an order appointing

receiver in a creditor's bill filed by complainant against

defendant, which was filed in the Circuit Court of the

United States for the District of Columbia.

It is not intended to pass upon the merits of the

application but confine our decision to the want of a writ-

ting affidavit supporting the bill.

The affidavit is made by one Henry H. Brown, the

petitioner for the writ. That affidavit is general

and contains no statement of any fact upon which the writ

can be based, as required by the complaint; that the

contents of the bill are true. The affidavit, complainant's

petition, is not a party to the litigation except as evidence

for the complaint, and is not by any event of the bill

connected with or interested in the case, or any of the

issues or things involved to exist. If the affidavit had been

a proper party to make the supporting affidavit, still the

averments in the affidavit were not sufficient to warrant the appointment of a receiver.

The receiver was appointed without any further showing than that made by the averments of the bill, verified by the solicitor for the complainant. The courts are strongly disinclined to sanction the practice of attorneys or solicitors appearing both as witnesses for their clients or in the verification of a pleading.

In City of Chicago v. Bisco, 204 Ill. App. 162, the court would not recognize a motion for a change of venue which was sworn to before the defendant's attorneys, saying:

"Such affidavits will not be received or considered by the court. 'By the general practice of all the courts, affidavits sworn before the attorney or solicitor in the cause cannot be read.'" Citing Tide's Practice 494; City of Chicago v. Simonetti, 203 Ibid. 279.

In the latter case the same ruling was indulged, where the affidavit for change of venue was sworn to by the attorney.

Adopting the reasoning in the case *supra*, as applied to the instant case, this court will not recognize the verification of the bill by the solicitor for the moving party. It therefore follows that the bill so verified must be treated as without, in contemplation of law, any verification; and it follows that the court had no verified facts before it on which to base its order appointing a receiver.

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the other is to be considered and

or solicitors appearing both as witnesses for their clients and as the verification of a pleading.

the court would not recognize a motion for a change of venue which was sworn to before the defendant's attorney.

208 12th, 27th.
Tide's Practice 404; City of Chicago v. Illinois
to a solution in the same manner as was "Citing
course, affidavits were before the attorney or
by the court." By the general practice of all the
"such affidavits will not be received or considered
208 12th, 27th.

where the affidavit for change of name was sworn to by
the attorney.

Adopting the reasoning in the case cited, as applied to the instant case, this court will not recognize the verification of the bill by the collector for the taxing party. It therefore follows that the bill so verified must be treated as without, in contemplation of law, any verification and it follows that the court had no verified facts before it on which to base its order appointing a receiver.

-5-

For the foregoing reasons the order of the
Circuit Court appointing a receiver is reversed.

REVERSED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

for the foregoing reasons the order of the
court is hereby affirmed and the case is remanded.

Very truly yours,
J. A. [Signature]

cc: [illegible]

State [illegible]

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156 - 32099

E. A. HOWARD,
Appellant,

v.

H. N. PATRICK and
J. MARTINA,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action brought on a promissory installment note, of which defendants were the makers and plaintiff the payee, for unpaid installments with interest thereon, amounting to \$5,426.87. A trial by jury resulted in a verdict for defendants against plaintiff, and from a judgment entered thereon for \$3,154.87 this appeal was taken.

The issues as finally made up presented the defense of no consideration for the giving of the note and no indebtedness due thereon, and a counterclaim.

Appellant and appellees were directors and stockholders in the Baker-Smith Coal Company. Its authorized number of shares were 500, no par value. Plaintiff held 375 shares of them represented by certificates No. 10 for 125 shares, and No. 11 for 250. He also had an unpaid claim of \$3,750 for salary against said company which the company was not in financial position to pay. Being pressed for money in his own business, the proposition was made that he cancel or assign said claim to defendants and sell to them stock for their promissory note for \$11,500, to be endorsed by one Fitzgerald, so that he might use the same as collateral to a loan to enable him to get the needed money. Several preliminary interview were had whereby an

243 I.A. 647

125 - 33039

E. A. HOWARD,

Appellant.

v.

H. W. PATRICK and
J. M. WILSON,

Appellees.

APPEAL FROM DECISION

COURT OF CHIEF

MR. JUSTICE J. M. WILSON

DELIVERED THE OPINION OF THE COURT.

This is an action brought on a promissory instrument, note, of which defendants were the makers and plaintiff the payee, for unpaid installment with interest thereon, amounting to \$5,428.87. A trial by jury resulted in a verdict for defendants against plaintiff, and from a judgment entered thereon for \$5,154.87 this appeal was taken.

The issues as finally made up presented the defense of no consideration for the giving of the note and no liability on the part of the note, and a counterclaim.

Appellant and appellees were directors and stockholders in the Baker-Smith Coal Company. Its authorized number of shares were 800, no par value. Plaintiff held 275 shares of them represented by certificate No. 10 for 125 shares, and No. 11 for 150. He also had an unpaid claim of \$3,750 for salary against said company which the company was not in financial position to pay. Being pressed for money in his own business, the proposition was made that he cannot or might claim to defendants and sell to them stock for their promissory note for \$11,000, to be secured by one Fitzgerald, so that he might use the same as collateral to a loan to enable him to get the needed money.

Several preliminary inquiries were had whereby an

arrangement to that effect was agreed upon. Practically the only difference between the parties with respect to its terms is whether plaintiff was to make a formal assignment of the salary claim to defendants. Defendants said he was, and he said he was to cancel or not assert it. However, neither was done.

After reaching the understanding defendants claimed that on Saturday, August 2, 1934, the date of the note, they went to plaintiff's office taking with them said note and a new certificate for 375 shares issued in their name, assigned in blank by both defendants and endorsed by said Fitzgerald; that they were then apprised by plaintiff that he could not find the original certificates, and as he was in a hurry to leave town he said he would get them and assign his salary claim on his return the following Monday; that when he was unable to produce the stock they asked for the return of the note and new certificate they had handed to him until he could produce the original certificates; that he told them to leave them and he would deliver his certificates and assign the claim on his return the following Monday; that on Monday he evaded like requests, saying he would look for his certificates in a safety deposit vault or at the bank; that during that week and repeatedly afterwards they requested plaintiff to return their note and the new certificate of stock until he produced his certificates and assignment of the salary claim.

Plaintiff denied that any such demands were made upon him for the return of the note and accompanying stock either at the time of their delivery or afterwards, but testified that after he apprised defendants of his inability to find his certificates of stock it was agreed among them to treat the same as lost, and defendants afterwards, on August 5, 1934, delivered the note and new certificate, without any condition whatever.

arrangement is that effect was agreed upon. Presumably the
only difference between the parties with respect to the terms is
whether plaintiff was to make a formal assignment of the salary
claim to defendant. Defendant said he was, and he said he was
to cancel or not cancel it. However, neither was done.
After receiving the undersigned defendant claimed that
on Saturday, August 2, 1936, the date of the note, they went to
plaintiff's office taking with them said note and a new certificate
for \$75 shown issued in their name, assigned in blank by both
defendants and endorsed by said T. J. Gorman; that they were then
approached by plaintiff that he would not find the original certificate
either, and as he was in a hurry to leave, even he said he would give
them and assign his salary claim on his return the following
Monday; that when he was unable to produce the note they asked
the like return of the note and now defendant they had handed to
him would be unable to produce the original certificate; that he
told them to leave them and he would deliver his certificate and
assign the claim on his return the following Monday; that on
Monday he arrived like before, saying he would look for his
certificate in a safety deposit vault or at the bank; that
during that week and repeatedly afterwards they requested plain-
tiff to return their note and the new certificate of stock until
he produced his certificate and assignment of the salary claim.
Plaintiff denied that any such demands were made upon
him for the return of the note and accompanying stock either at
the time of said delivery or afterwards, but testified that
after he assigned defendant of his liability as time was
certification of stock it was agreed among them to trace the same
as lost, and defendant afterwards, on August 2, 1936, delivered
the note and new certificate, without any condition whatever.

knowing he was to use the same immediately at his bank as collateral, and that they took his receipt for the new certificate of stock, left with him for such purpose. Said receipt, introduced in evidence, recites that it was taken as collateral to defendants' note, and it appears that they took it when the note was delivered and attached ^{it} to the stub of the reissued certificate.

The main controversy of fact lies in the dispute as to what was said at the time defendants' note and collateral thereto were left with plaintiff, defendants' testimony tending to show that they were left with plaintiff on condition that he deliver his certificates and an assignment of his salary claim. In other words, that there was not an absolute delivery of their note. This, however, is hardly in harmony with the allegations of their pleadings. Plaintiff's testimony is to the effect that the delivery of the note was absolute, with knowledge that he was to use it immediately as collateral. His contention appears to be supported by the facts that after the new certificate was issued an annotation was made under Ortina's directions both upon the certificate and the stub thereof to the effect that it was issued in lieu of plaintiff's certificates, that when it was delivered defendants took and retained plaintiff's receipt for said certificate thus evidencing their claim to its ownership, that pursuant to notice and request the next day, August 6, from the bank in which the note and new certificate were deposited as collateral, defendants paid without protest in any form the installments on the note as they fell due for the four following months and \$500 on the installment due January, 1926, in which month said company went into the hands of receivers. After that no more installments were paid and this suit was begun August 22, 1925, for the unpaid installments due up to that time and interest thereon. In January, 1926, plaintiff found the original certificates and

... immediately of his bank as
collateral, and that they took his receipt for the new certificate
of stock, left with him for such purpose. Such receipt, intro-
duced in evidence, testified that it was taken as collateral to
defendants' note, and it appears that they took it when the note
was delivered and attached to the end of the returned certificate.
The main controversy of fact lies in the dispute as to
what was said at the time defendants' note and collateral there-
to were left with plaintiff, defendants' testimony tending to show
that they were left with plaintiff on condition that he deliver
his certificate and an assignment of his salary claim. In other
words, that there was not an absolute delivery of their note.
This, however, is hardly in harmony with the allegations of their
petition. Plaintiff's testimony is to the effect that the
note was delivered to him and that he was to deliver it to the
bank immediately as collateral. His contention appears to be
supported by the facts that after the note was delivered to
plaintiff and the bank agreed to the effect that it was to be
delivered to plaintiff's certificate, that when it was delivered
defendants took and retained plaintiff's receipt for said certificate
and evidencing their claim to the same. That payment of
note and receipt the next day, January 6, from the bank in which
the note and new certificate were deposited as collateral, and that
note was paid without protest on the part of the bank on the
day they fell due for the same following month and \$500 on the
installment due January, 1916, in which month said company went
into the hands of receivers. After that no more installments
were paid and this note was begun August 22, 1916, for the unpaid
installments due up to that time and interest thereon. In
January, 1916, plaintiff found the original certificate and

marking them as "cancelled," immediately returned them to the receivers of the company, and they were pinned to the respective stubs of the original certificates.

The defense set up in each of defendants' affidavit of merits is that there was "no consideration" and no indebtedness to plaintiff. Patrick set up as an additional defense the failure of plaintiff to deliver the stock and assignment at the time of the delivery of the note. Even if such additional defense or defendants' testimony can be construed as a claim that the delivery of plaintiff's stock and assignment of the wage claim were conditions precedent to the delivery of their note and the accompanying stock, we think the weight of the evidence is against such theory. There is no claim that defendants parted with their note and new certificate by duress or fraud, and their conduct in accepting and retaining said receipt for the stock, evidencing as it did their ownership thereof, and in treating their note as a valid obligation from the time of its delivery, and their counterclaim based upon an affirmance of the contract and a claim for damages for breach of contract based upon plaintiff's failure to deliver the original certificates and assignment of salary, are inconsistent with the theory of a conditional purchase or a want of failure of consideration to support the contract.

But as another ground for failure of consideration, defendants claim that the title to plaintiff's stock never passed to them because title could be transferred only by delivery of his certificates as provided by section 1 of the Uniform Transfer Act of June 28, 1917, (Cahill's R. S. Ch. 32, par. 229) and that, therefore, authorities cited by plaintiff antedating the passage of said Act to the effect that title passes by the transfer on the company's books are no longer applicable. Said section is

... arriving from the ...
 receivers of the company, and they were placed in the respective
 state of the original ...
 The balance set up in each of ...
 merits is that there was "no contribution" and no ...
 to plaintiff. ...
 failure of plaintiff to deliver the stock and assignment of the
 time of the delivery of the stock. Even if such additional balance
 is ...
 delivery of plaintiff's stock and assignment of the same claim
 and ...
 accompanying stock, we think the weight of the evidence is against
 this theory. There is no claim that defendant acted with intent
 ...
 in ...
 as it is ...
 a valid obligation from the ...
 defendant's failure to deliver the stock and assignment of the
 for damages for breach of contract based upon plaintiff's failure
 to deliver the original certificates and assignment of stock.
 are inconsistent with the theory of a conditional purchase of a
 want of failure of defendant to support the contract.
 ...
 defendant claim that the stock is plaintiff's stock never passed
 to them because it is not ...
 his certificate as provided by ...
 of June 22, 1917, (Gallie's E. & W. Co. No. 22) and ...
 ...
 it will not be the effect that the stock is the property of the
 company's books are no longer applicable. This decision is

manifestly not applicable when the certificate is lost, and while the statute manifestly contemplates a remedy for that fact as in section 17 of the Act which provides for the issuance of a new certificate by an order of court upon the giving of a bond to protect the corporation or any person injured by its issuance from any liability or expense which it or they may incur by reason of the original certificate remaining outstanding, such remedy is merely cumulative and does not prevent resort to other appropriate remedies. (Bank of Commerce v. Bank of Newport, 63 Fed. 898; State v. Schofield, 136 La. 702, 720; Fletcher's Cyc. on Corp., Vol. 5, Sec. 3498, p. 5795.) Such and like provisions for the transfer of stock, whether provided by statute or the charter or by-laws of corporations are construed generally by the courts as intended for the protection of the corporation or for a purchaser of the outstanding stock, and such purpose is generally taken into consideration by the courts in determining the effect of a failure to comply therewith. (id. sec. 3789, p. 6318.) As stated in the cited section: "Such provision is not intended to prevent the alienation of corporate stock, or to prescribe an exclusive method whereby a stockholder may divest himself of his title or may assign it to a third party; and hence a failure to comply with it does not affect the validity of a transfer as between the parties thereto." The corporation may voluntarily issue a new certificate (id.), as was done in this case, and if a party accepts it, he must be held to assume the risk of any trouble that might arise from outstanding certificates. (Boatman's Ins. and Tr. Co. v. Able, 48 Mo. 136.) We think, therefore, that as between the parties themselves the validity of the reissued certificate cannot be questioned, and that defendants by their conduct are estopped from questioning it. If, therefore, as between the parties, the title to plaintiff's stock must be deemed

and, finally, not a valid one when the certificate is lost, and
and the statute manifestly contemplated a remedy for this
fact as its section 17 of the act which provides for the issuance
of new certificates by an order of court upon the giving of a
bond to protect the corporation or any person injured by the
issuance from any liability or expense which it or they may
incur in recovery of the original certificate from the out-land-
ing, such remedy is merely cumulative and does not prevent recovery
as other appropriate remedies. (Bank of Commerce v. Bank of
Chicago, 63 Fed. 888; Bank v. Bank, 122 La. 708, 45 So.
113; Bank v. Bank, 122 La. 708, 45 So. 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

to have passed by said transfer, it cannot be said there was a want of consideration.

But there is testimony of defendants tending to support a different theory, one upon which the counterclaim is based, namely, that defendants surrendered the note and stock upon plaintiff's promise to deliver at a later time his certificates of stock and assignment of his wage claim. The counterclaim unquestionably claims damages for failure to perform such promise. But a failure to perform such promise, if made, did not constitute failure of consideration. (Gage v. Lewis, 68 Ill. 604; Lenzer v. McAvoy, 284 Ill. App. 359; Newton v. Clarke, 138 Ill. App. 196; Miller v. Fire Ins. Co., 264 Ill. 380.) As said in the cited authorities, such promise amounted to a contract, and the alleged failure to perform did not constitute a want of failure of consideration but merely deprived defendants of the benefits expected from it. If there was no consideration there is no basis for defendants' counterclaim which manifestly is predicated, not upon a rescission of the contract, but upon the affirmation of a contract whereby they parted with their note and suffered damages for plaintiff's failure to carry out his part of it. The damages claimed are the value of plaintiff's stock and the value of the wage claim. The stock had no par value, and no proof was made either of its actual or market value (14 C. J. 717) or the value of the wage claim, or in fact that either had had any real value. And without some proof of value the jury's verdict and the judgment rest upon conjecture with regard thereto. If defendants were entitled to a set-off then plaintiff was entitled to the amount due on the note less the set-off.

It is apparent the judgment cannot stand and must be reversed. While there is considerable force to plaintiff's

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But there is testimony of substantial change in the
. based on substantial and reliable evidence. The

1. The Commission has received information from the State of New York that the State has received a letter from the State of New York dated 10/10/1961, in which the State of New York has requested that the Commission investigate the matter.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have been afflicted by a severe drought and famine. The President expresses his sympathy for the suffering people and offers them his best wishes for a speedy recovery.

Failure of completion of work.

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for plaintiff's failure to carry out his part of it. The damages

either of the actual or market value (2.7.78) or the value

And I have some proof of what the jury wanted and the judge

contention that there was no proof tending to support the defense of no consideration, or of a failure thereof in the absence of any proof of damages, except nominal damages, we think the contract contemplated an assignment or surrender to defendants of the salary claim as a part of the consideration, which may be worth more than nominal damages, and in justice the case should go back for a new trial.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

CHARLES MORVIL, whose true
name is Charles Morbutos,
Appellant,

v.

DOMINICK WITKUS,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUDGE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment and finding for the defendant in a suit brought upon his note, made payable to plaintiff, in the name of Charles Morvil for \$1,000 and accrued interest at 4 per cent per annum from its date, December 19, 1925.

A judgment for plaintiff by confession was reopened for hearing on the petition of defendant setting up in effect that plaintiff never had any interest or title to the note, and that his wife was the sole and beneficial owner thereof; that she furnished the money for which it was given, gave it to plaintiff to hand to defendant and to receive said note therefor; that she entered into such arrangement fearing if she obtained the note in her own name she would not be able to collect it; that defendant believed it was a loan from plaintiff and executed the note therefor.

On hearing evidence bearing on the issues raised in said petition, which stood as an affidavit of merits, a judgment and finding for defendant were entered as aforesaid.

We need not refer to the conflicting evidence as to whether as a matter of fact the money furnished for the note came actually from plaintiff, as he claims, or from defendant's wife, as defendant claims. Evidence was received tending to

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 10, 1934

RECEIVED

IN SENATE
JANUARY 10, 1934

This is an appeal from a judgment and finding for the
defendant in a suit brought upon his note, made payable to
plaintiff, in the name of Charles Henry for \$1,000 and interest
thereon at 4 per cent per annum from the date, December 15, 1932.
A judgment for plaintiff by confession was returned for
breach on the position of defendant setting up in effect that
plaintiff never had any interest or title in the note, and that
his wife was the sole and beneficial owner thereof; that she
transferred the money for which it was given, gave it to plaintiff
to hand to defendant and in receipt said note therefor; that she
entered into such arrangement knowing it and obtained the note
in her own name and would not be able to collect it; that defendant
believed it was a loan from plaintiff and executed the note therefor.
On hearing evidence bearing on the issues raised in such
petition, which stood as an affidavit of merits, a judgment and
finding for defendant were entered as aforesaid.

support both theories. But it matters little which theory is correct. The legal title to the note was unquestionably in plaintiff. As said in Popovsky v. Granite City Trust & Savings Bank, 243 Ill. App. 526:

"It is no defense to an action on a promissory note that the plaintiff, although the holder of the legal title to the note, is merely the nominal party in interest, and that the beneficial interest in the note is in some one other than the plaintiff. It is a matter of no consequence, so far as the defendant is concerned, who may be the equitable holder of the note unless the defendant has a defense as against the equitable owner thereof." (Citing Illinois Conference, etc. v. Flagg, 177 Ill. 451, and Peulner v. Gilliam, 211 Ill. App. 343.)

Plaintiff being the nominal party in interest and legal owner of the note had the right to bring suit thereon in his own name (Longman v. Cass County Bank, 37 Ill. 316; Caldwell v. Lawrence, 84 Ill. 161; Henderson v. Davidson, 157 Ill. 379; Illinois Conference, etc. v. Flagg, supra), and it is no defense that defendant's wife claimed to be the equitable owner thereof. It is a matter of no consequence, so far as defendant is concerned, who may be the equitable owner of the note. Even if plaintiff is merely the trustee or the agent for defendant's wife as the beneficial owner of the note, yet defendant cannot interpose such a defense unless he has a good defense to the note as against the beneficial owner. (Peulner v. Gilliam, supra, and cases there cited.) The defense made purports to be in the interests of the wife and not of plaintiff. While she joined in the petition that did not make her a party to this action. No judgment could have properly been entered herein for or against her, and it was erroneously given for defendant, there being no legal defense or evidence to sustain it. Even if the wife has any claim to money that may be collected on the note and judgment therefor she must assert it in an independent proceeding.

support both theories. But it matters little which theory is

correct. The legal title to the note was unquestionably in

plaintiff. As held in Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101.

101 S.W. 2d 101.

"It is no defense to an action on a promissory note that the plaintiff, although the holder of the legal title to the note, is not the beneficial owner in interest, and that the beneficial interest in the note is in some one other than the plaintiff. It is a matter of no consequence, so far as the defendant is concerned, who may be the beneficial owner of the note unless the defendant has a defense on account of the equitable owner's conduct." (Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101, and Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101.)

Plaintiff being the nominal owner in interest and having

control of the note had the right to bring suit thereon in his own

name. Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101.

101 Tex. 5, 81 S.W. 2d 101.

Consequently, Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101, and it is no defense that

defendant's wife claimed to be the equitable owner thereof. It

is a matter of no consequence, so far as defendant is concerned,

who may be the equitable owner of the note. Even if plaintiff

is merely the trustee or the agent for defendant's wife as the

beneficial owner of the note, yet defendant cannot implead such

a defense unless he has a good defense to the note on account

of the beneficial owner. (Wright v. Wright, 101 Tex. 5, 81 S.W. 2d 101, and cases there

on.) The defense was proper to be in the interest of the

wife and not of plaintiff. Also she joined in the petition

that she was not a party to this action. No judgment could

have properly been entered herein for or against her, and it was

erroneously given for defendant, there being no legal defense on

evidence to sustain it. Even if the wife has any claim to

money that may be collected on the note and judgment thereon in

such amount it is an independent proceeding.

The court erred in entering a judgment and finding for defendant and should have entered a judgment for plaintiff for the amount of the note with interest thereon. Accordingly a judgment will be entered here for the amount of said note with interest thereon as aforesaid, from its date, at the rate of four per cent per annum, and for \$100, for attorney's fees as provided therein, to-wit, for \$1191.66.

REVERSED AND JUDGMENT HERE.

Gridley and Scanlan, JJ., concur.

The above is a summary of the work done by the
Committee on the subject of the "New York
Plan" for the improvement of the harbor of New York
and the adjacent waters. The Committee has been
very fortunate in securing the cooperation of the
various agencies concerned, and in obtaining the
best of service from all of them. The Committee
has also been very fortunate in securing the
cooperation of the various agencies concerned, and
in obtaining the best of service from all of them.

Very respectfully,
The Committee on the New York Plan

Chairman, New York Harbor Committee

I. URY,

Appellee,

v.

ALBERT J. SIMON and
MORRIS BORDACOV,

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MORRIS BORDACOV,
Appellant.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

From an order confirming a judgment by confession entered herein against Albert J. Simon and Morris Bordacov on a note signed by each of them, dated April 15, 1926, due six months thereafter for the sum of \$620, and payable to the order of plaintiff, said Bordacov has appealed.

The defense set up in the petition on which the judgment was opened and which stood as an affidavit of merits was (1) that the defendants received nothing of value for the note in question; and (2) that the consideration for which the note was given had failed.

As a basis for such contentions the petition set up that said note (together with a like note for a like amount, due three months from its date) was given to plaintiff as security as provided in a lease from plaintiff as lessor to the defendant, Simon, as lessee, of certain premises for a store, said two notes when paid to be held by the lessor as security for the payment of the last two months rent of the five year term created by the lease; that the note first due was paid to plaintiff and held as security in accordance with

ALBERT JOHN HANCOCK
COUNT OF CHIEF OF

MR. HANCOCK, JUDGE
RECEIVED THE COPY OF THE COURT.

Then an order containing a judgment by the court
entered herein against Albert J. Hancock and Mary J. Hancock
on a note signed by each of them, dated April 12, 1924, for
six months thereafter for the sum of \$250.00, and payable to
the order of plaintiff, said Hancock has appealed.
The defense set up in the petition on which the
judgment was entered and which stood as an affidavit of service
was (1) that the defendants received nothing of value for the
note in question; and (2) that the consideration for which the
note was given had failed.
As a basis for such contention the petition set up
that said note (together with a like note for a like amount,
due three months from the date) was given to plaintiff as
security for a loan from plaintiff to the defendants, and as
security for the payment of the loan two months past of the
five years term created by the loan; that the note first due
was paid to plaintiff and held an account in accordance with

the provisions of the lease; that thereafter, on July 19, 1926, Simon surrendered possession of the premises to plaintiff, and plaintiff accepted the surrender and purchased the merchandise therein from Simon; that the payment of the note first falling due was more than sufficient to liquidate the rent that had accrued at the time of such surrender.

Defendants offered in evidence the lease in question, being one between the Post Office News Company, a corporation, lessor, (not the plaintiff), and said Simon, lessee. It provided for the rent to be paid in instalments, the last twelve for \$620 each, and recited that the lessee had deposited said two notes, the sum thereof, (\$1240), when paid, to be held by said lessor as security for the payment of rent and performance of all other obligations of the lessee, and that in case of the proper payment of rent preceding the two last monthly instalments said sum should apply as rent for the last two months of the lease, otherwise to be forfeited as liquidated damages "for the benefit of said lessor."

The defendants also offered the agreement of July 19, 1926, between the lessor and lessee cancelling said lease and releasing each from any liability to the other arising out of the same, in consideration of a sale to the lessor by the lessee of the merchandise contained in the leased store. By such instrument the lessor released the lessee from all rent theretofore or thereafter accruing under the lease, on the condition, however, that the cancellation should not be effective until after the payment of the note in question, the agreement to be held in escrow and not delivered until the payment of said note, and that the lessor was to retain the amount paid on the first note, together with the second note, as and for full consideration of

The provisions of the lease of the premises, on July 10, 1935, and
which authorized possession of the premises to plaintiff, and
plaintiff accepted the same and purchased the merchandise
therein from him; that the payment of the note was falling
due and was not being paid by defendant the same that had
expired at the time of such surrender.

Defendant offered in evidence the lease in question,
which was signed by the First Office News Company, a corporation,

lease, (not the plaintiff), and said lease, issued, it
provided for the rent to be paid in installments, the last two
for \$500 each, and recited that the lessee had deposited said two
notes, the sum of \$1,000, when paid, to be held by said
lessee as security for the payment of rent and performance of all
other obligations of the lessee, and that in case of the
default of the lessee, the two last monthly installments said
sum should apply as rent for the last two months of the lease,
otherwise to be forfeited as liquidated damages for the benefit
of said lessor."

The defendant also offered the agreement of July 10,
1935, between the lessor and lessee concerning said lease and
installments each from any liability to the other arising out of
the same, in consideration of a note to the lessor by the lessee
of the merchandise, contained in the lease above. It was
recited in the lease that the lessee had agreed to pay the
merchandise acquired under the lease, on the condition, however,
that the cancellation should not be effective until after the
payment of the note in question, the agreement to be held in
force and not released until the payment of said note, and
that the lessee was to retain the amount paid on the first note,
together with the second note, as and for full consideration of

its claims under said lease, and that Bordacov (who is erroneously referred to as endorser on said notes) should not be released by the execution of said agreement.

Bordacov testified that he did not know plaintiff, never met him until the trial, was not present when the agreement was executed and had no notice of it.

It is perfectly clear that by the mutual covenants in the lease, and the taking possession of the premises by Simon and paying rent thereunder, there was a valuable consideration passing to the latter by reason of which the note in question was executed. Where there is a valuable consideration passing to one of the makers of a note by reason of which another executes it, that is sufficient to sustain it. In case of a joint note, if the consideration is good as to one obligor it is good as to the other and cannot be severed. (8 C. J. p. 211, and cases there cited.) By the very terms of the note appellant is liable as a co-maker, and it was not necessary that he should have received any benefit for his promise, there being a sufficient consideration to support the promise of the lessee, the other co-maker.

(Westphal v. Neville, 92 Cal. 545; Motzerott v. Ward, 10 App. (D. C.) 514; Briggs v. First National Bank of Beatrice, 41 Nebr. 17.)

It is next contended that if there was a consideration appellant was a surety and the terms of his obligation were varied without his knowledge or consent by said agreement for cancellation. No such defense was made below and, therefore, might be wholly disregarded, being made here for the first time. But it is apparent from the face of the note that appellant was a co-maker and not a surety. If he was a surety he could not avail himself of his rights as such without knowledge or notice to the legal holder of the capacity in which he signed the note

the claim under said instrument was assigned (who is assigned)
returned to an assignor (or said assignor) should not be released by
the execution of said instrument.
The assignor testified that he did not know plaintiff, nor
met him until the trial, was not present when the agreement was
executed and had no notice of it.
It is generally agreed that by the mutual consent in
the issue, and the taking possession of the property by assignor
and paying rent thereunder, there was a valid consideration
binding to the issue by reason of which the note is enforceable
and there is no doubt that the consideration was
one of the nature of a note by reason of which another exception
is that in relation to certain 12. In case of a joint note, 12
the consideration is good as to one obligor it is good as to the
other and cannot be recovered. (2 C. 2. p. 211, and cases there
cited.) By the very terms of the instrument it is
so-made, and it was not necessary that he should have received
any benefit for his promise, there being a sufficient consideration
in support of the promise in the issue, the other co-obligor.
(Wheeler v. Wheeler, 22 Cal. 2d 101, 102; Wheeler v. Wheeler, 10 App.
(2d 21) 211; Wheeler v. Wheeler, 22 Cal. 2d 101, 102.)
Note 17.)
It is now contended that if there was a consideration
assigned was a surety and the form of his obligation was
voided without his knowledge or consent by his agreement for
assignment. No such defense was made before and, therefore,
might be wholly disregarded, being made here for the first time.
But it is apparent from the fact of the note that appellant
was a co-maker and not a surety. If he was a surety he could not
avail himself of his rights or such without knowledge or notice to
the legal holder of the capacity in which he signed the note

(32 Cyc. p. 32; Piper v. Headlee, 39 Ill. App. 93; Metzerott v. Ward, supra), of which there is no proof.

Nor is there any room for the contention that appellant's contract, which was on the note only, was in any way varied. That contract was not changed or varied. He was not a party to either the lease or the agreement for the cancellation thereof. Nor did the latter operate to release either of the makers of the note from their promise of payment. In fact, the agreement was specifically conditioned upon its payment.

Plaintiff was not the lessor, as alleged in defendant's petition, but was to hold the note and the amount thereof when paid, as security for the benefit of the lessor. The legal title to the note, however, is in him. While the lessor by the terms of the lease would be entitled to the proceeds from the collection of the note, that fact does not constitute a defense to the action. (Illinois Conference, etc. v. Flagg, 177 Ill. 431, 433.) The action is properly brought in the name of the holder of the legal title. (Caldwell v. Lawrence, 84 Ill. 161; 8 C. P. p. 822; Illinois Conference, etc v. Flagg, 177 Ill. 431, and cases there cited.)

The judgment will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

17. *Journal of the American Statistical Association*, 97 (1992), 487-493.

[illegible]

229 - 32170

MONIE SUDLEVITS,
Appellant.

v.

SINGER SEWING MACHINE COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs against plaintiff. The action was brought under section 2 of the Act of June 21, 1895, as amended in 1915, (Cahill's Ill. R. S. Ch. 95, par. 25), to recover one-third of the value of mortgaged personal property sold on foreclosure for failure of the mortgagee to furnish a statement, as required by said section, to the mortgagor of said property within ten days after said sale.

The statement of claim alleges that plaintiff purchased the property in question of defendant and that for balance of the purchase price he and one Boltman executed the chattel mortgage that was thus foreclosed, and that no statement of the foreclosure, as required by the statute aforesaid, was delivered to him or to said Boltman within the statutory period.

Defendant pleaded that plaintiff individually did not purchase the property in question of defendant, and that it was bought by him and Boltman as copartners. The proof adduced supported this averment, and also the defence of an adjustment within ten days after the foreclosure sale between plaintiff and defendant through their authorized agents and at defendant's

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This is an appeal from a judgment for costs against plaintiff. The action was brought under section 2 of the Act of June 21, 1908, as amended in 1911, (Capilli's 111. R. 2. 07). D. par. 22), to recover one-third of the value of mortgaged personal property sold as satisfaction for claims of the mortgagee to certain a judgment, as required by said section, to the mortgage of said property within ten days after sale.

The statement of claim alleges that plaintiff purchased the property in question of defendant and that for balance of the purchase price he and son defendant executed the chattel mortgage that was then foreclosed, and that no statement of the foreclosure as required by the statute aforesaid, was delivered to him or to said defendant within the statutory period.

Defendant pleads that plaintiff individually did not purchase the property in question of defendant, and that it was bought by him and son as co-defendants. The court refused to accept this averment, and also the balance of an answer made within ten days after the foreclosure sale between plaintiff and defendant through their authorized agents and as defendant's

request, whereby plaintiff secured the return of the property to his authorized agent at the precise sum at which the property was bid in without any additional expense or cost of foreclosure, and whereby plaintiff on payment of the balance due on the note secured its cancellation and a release of the mortgage of record. In other words, the effect of the arrangement was the same as if there had been no foreclosure and plaintiff took up the note for the precise amount due thereon and secured a release of the mortgage on the property.

If the right of action were in plaintiff we think upon such a state of facts he would be deemed to have waived it.

But under the statute it is only the owner of the mortgaged property that can bring such a suit. There was no proof that plaintiff was the owner. The proof tends to show that when the mortgage was foreclosed the property belonged to a partnership composed of plaintiff and one Boltman, that it was previously purchased for their business and that the notes were given for part of the purchase price. Both he and Boltman executed them and the mortgage. There was no proof of the dissolution of such partnership before the foreclosure sale, or that at the time of the foreclosure sale plaintiff individually was the owner of such property. The burden was upon him to prove that he was. Without proof to that effect he was not entitled to a judgment.

Accordingly the judgment against him is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

request, whereby plaintiff to and the return of the property to his authorized agent at the residence and at which the property was bid in without any additional expense or cost of transportation and whereby plaintiff on payment of the balance due on the note secured its cancellation and a release of the mortgage of record. In other words, and out of the arrangement was the same as if there had been no default and plaintiff took up the note for the proceeds amount due thereon and secured a release of the mortgage on the property.

If the right of action were in plaintiff we think upon such a state of facts he would be deemed to have waived it. Plaintiff further states that the state is in only the owner of the mortgaged property that can bring back a suit. There was no proof that plaintiff was the owner. The proof tends to show that when the mortgage was given the property was owned by defendant, the husband of plaintiff and one Helman, that it was provisionally assigned for their children and that the notes were given for part of the purchase price. Both he and Helman executed when and the mortgage. There was no proof of the classification of such property before the foreclosure sale, or that at the time of the foreclosure sale plaintiff individually was the owner of such property. The burden was upon him to prove that he was. Plaintiff failed to make effect he was not entitled to a judgment. Accordingly the judgment against him is affirmed.

ATTORNEYS.

WITNESSES AND PROPERTY.

Special and General, etc.

LENA CORN et al.,
Appellees,

v.

MAX ENSLOW, executor of
the estate of Mathilda Enslow,
deceased,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$2000 entered on a directed verdict for plaintiffs at the close of all the evidence.

The statement of claim is for the recovery of damages for failure of defendant's decedent to carry out a contract for the purchase of real estate from plaintiffs.

The contract recites that the purchaser has paid \$2000 as earnest money to be applied on the purchase price when the deal is consummated, and provides "that the earnest money paid as above, shall, at the option of the vendor be retained by the vendor as liquidated damages" if the purchaser fails to perform the contract on her part, and

"In the event the deal is not consummated through the default on the part of the buyer, then and in such event \$1000 of said earnest money shall be paid to the sellers and \$1000 to David Haas."

It appears, however, that no earnest money was paid but that the purchaser, Mrs. Enslow, gave a check for \$2000 to the order of the broker, said Haas, before the contract was signed, with instructions not to use it before the contract was executed, and that he handed the check to her attorney in the transaction who has retained the same ever since, the

4-20-1964

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

De l'ensemble des faits et des données, il résulte que :

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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2. 凡在本行开立存款账户的存款人，其存款账户的预留印鉴，均须由存款人本人或授权代理人持有效身份证件，在开户时或变更时，向本行提供并加盖在存款账户上。

[illegible]

maker having stopped payment thereon the next morning after the execution of the contract.

Upon this evidence the court directed a verdict as aforesaid.

But there was no proof of damages. The assessment of damages can be accounted for only on the theory that the court construed the contract as one whereby the parties agreed to \$2000 as liquidated damages. But regardless of whether there was any specific fund to be retained as damages the provision in the contract that the earnest money should be retained as such damages "at the option of the vendor" has been held to be inconsistent with the view that the parties adjusted in advance the damages that might arise by any breach of the contract. (Advance Amusement Co. v. Franke, 133 Ill. App. 457; 268 Ill. 479, 583; Kay Gee Amusement Co. v. Cave, 177 Ill. App. 250.)

Without proof of damages, therefore, the judgment cannot stand, and accordingly the judgment must be reversed and the cause remanded for error in refusing to grant a new trial.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

which having stopped payment thereon the bank retained the
possession of the contract.

Upon this evidence the court directed a verdict in
favor of the bank.

But there was no proof of damage. The court said it

damages can be established for only on the theory that the bank
retained the contract as one of the party the parties agreed to \$10000
as liquidated damages. But regardless of whether there was any

specific fund to be retained as damages the provision in the
contract that the amount money should be retained as such damages
"the price of the contract" has been held to be inconsistent

with the view that the parties intended to advance the damages
that might arise by any breach of the contract. (Citation)
12. v. ... 100 Ill. App. 471; 202 Ill. App. 472; 202 Ill. App. 473.

13. v. ... 100 Ill. App. 474; 202 Ill. App. 475; 202 Ill. App. 476.
Although proof of damages, then, was not required, the court
said, and accordingly the judgment must be reversed and the case

reversed. (Citation)
14. v. ... 100 Ill. App. 477; 202 Ill. App. 478; 202 Ill. App. 479.

15. v. ... 100 Ill. App. 480; 202 Ill. App. 481; 202 Ill. App. 482.

16. v. ... 100 Ill. App. 483; 202 Ill. App. 484; 202 Ill. App. 485.
17. v. ... 100 Ill. App. 486; 202 Ill. App. 487; 202 Ill. App. 488.
18. v. ... 100 Ill. App. 489; 202 Ill. App. 490; 202 Ill. App. 491.

UNDERWRITERS MUTUAL INSURANCE
COMPANY, a corporation,
Appellant,

v.

THE FIRST NATIONAL BANK OF
OAK PARK,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The appellant in this case was organized under the laws of this state December 6, 1923. Another corporation of the same name was organized about May 14, 1916, under the laws of this state and was dissolved about December 19, 1923. Appellant purchased the assets of the latter company December 11, 1923, and assumed its debts and liabilities. Among the alleged liabilities of the company was its note for \$2500 to R. W. Hunter & Company, a copartnership. On November 1, 1919, the copartnership gave its collateral note to the Austin Avenue Trust & Savings Bank (now the First National Bank of Oak Park, appellee and cross complainant, hereinafter referred to as the bank), and among the collateral to secure the same was said note for \$2500, on which said bank obtained a judgment by confession May 20, 1924, for \$3106.64.

Appellant's bill herein sought to set aside said judgment and remove the same as a cloud upon the title of its real estate and to restrain the bank from collecting said judgment upon an execution issued thereon and served on appellant, or that might be issued in the future, and said bank sought by cross bill to enforce said judgment against appellant.

3481A.746

200 - 22127

UNIVERSITY MICROFILMS
SERIALS ACQUISITION
SERIALS ACQUISITION

COOL BERRY

v.

THE UNIVERSITY MICROFILMS
SERIALS ACQUISITION

THE UNIVERSITY MICROFILMS

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The decree appealed from confirmed the master's report, and pursuant to the master's recommendation, dismissed appellant's bill and found said judgment was a just and legal obligation of appellant to said bank for the amount thereof with interest, amounting to \$3573.66, and reserved the right of the court to take such action to enforce its payment as it may deem best if not paid within 10 days from the decree.

The cross-bill, after setting up the transaction with R. W. Hunter & Company, the filing of a petition in bankruptcy against said company in the Federal Court, the entry of an order therein reciting among other things that the bank was the legal holder of said note for \$2500, the issuance of an execution on such judgment against the assets of the "Underwriters Mutual Insurance Company;" the assumption by appellant of the debts and liabilities of the defunct corporation, alleged that appellant and its officers were engaged in secreting the assets of the defunct corporation so that they could not be reached for the purpose of satisfying said judgment, and that cross complainant believes that the only way it can ever recover on the judgment against appellant is by appointment of a receiver to take over its assets and distribute them under the direction of the court. There was no attempt to prove this last allegation. The prayer asked that said judgment be declared a valid judgment against appellant, and that it be required to turn over to a receiver all the assets it took over from the defunct company, and that a receiver be appointed, etc.

In its answer to the cross bill appellant alleges that it was a total stranger to the proceedings in bankruptcy and to those relating to said judgment, admits taking over the assets of

The docket appeared from examining the master's report, and pursuant to the master's recommendation, dismissed appellant's bill and costs, and ordered that the amount thereof with interest, amounting to \$3578.00, and reserved the right of the court to take such action as to enforce the payment as it may deem best if not paid within 10 days from the docket.

The cross-bill, after setting up the transaction with N. W. Hunter & Company, the filing of a petition in bankruptcy against said company in the Federal Court, the entry of an order therein reciting among other things that the bank was the legal owner of the bill, and that the issuance of an execution on said bill was for \$3500, the issuance of an execution on said judgment against the assets of the "United States Mutual Insurance Company," the assumption by appellant of the debts and liabilities of the bankrupt corporation, alleged that appellant and its officers were engaged in receiving the assets of the bankrupt corporation so that they could not be reached for the purpose of satisfying said judgment, and that such conduct was liable that the only way it can ever recover on the judgment against appellant is by appointment of a receiver to take over its assets and distribute them under the direction of the court. There was no attempt to prove this last allegation. The court ruled that said judgment be deemed a valid judgment against appellant, and that it be required to turn over to a receiver all the assets it took over from the bankrupt company, and that a receiver be appointed.

It was further ordered that the cross-bill against appellant be dismissed, and that the costs of the proceedings in bankruptcy and in these proceedings be paid by appellant, subject to the order of the court.

the defunct corporation and assuming its liabilities, but denies liability upon or for said judgment or the note on which it was entered, and alleges a want of consideration for the note and lack of authority to execute it, and in effect that the copartnership note, to which the note in question was pledged as collateral, was not binding on said copartnership.

It thus appears from the pleadings themselves that the judgment sought to be vacated and declared a cloud upon the title to plaintiff's property is a judgment against the defunct corporation and not one against appellant. It is manifest, therefore, that the judgment as such cannot be a lien upon appellant's property, and that appellant was entitled to relief under its bill so far as it seeks to declare said judgment to be such a cloud, and to relief against a levy of any execution issued thereon against its property. It was error, therefore, to dismiss the bill for want of equity.

If the judgment as such is not binding on appellant then it is not entitled to have it set aside. The proof, however, was insufficient to sustain the contention that there was no consideration for the note on which the judgment was entered, and lack of authority to execute it.

The real question presented, however, is whether appellee as cross-complainant is entitled to the relief given under the decree. If so, it must be under the general prayer of the cross-bill and not on the specific prayer that said judgment be declared a valid and existing judgment against complainant. The decree is based entirely upon the court's finding that said judgment is a just and legal obligation of complainant which with interest amounts to \$3578.66, which it decrees shall be paid within 10 days of the decree; in other words, on the theory that said judgment is

the defendant corporation and continuing the liability, and the
liability upon or for said judgment or the note on which it was
entered, and alleged a want of consideration for the note and
lack of authority to execute it, and in effect that the corporation
did not, to which the note in question was placed as collateral,
was not binding on said corporation.

It thus appears from the evidence themselves that the
judgment ought to be vacated and dissolved a claim upon the basis
of plaintiff's property is a judgment against the defendant cor-
poration and not one against the plaintiff. It is manifest, therefore,
that the judgment as such cannot be a lien upon appellant's property,
and that appellant was entitled to relief under the bill as far
as it seeks to enforce said judgment to be made a claim, and to
relief against a levy of any execution issued thereon against the
property. It was error, therefore, to dismiss the bill for want
of equity.

If the judgment as such is not binding on appellant from
it is not entitled to have it set aside. The point, however, is
irrelevant to the case, in the case in which there was no consideration
for the note on which the judgment was entered, and lack of authority
to execute it.

The next question presented, however, is whether appellant
is barred-complaintant is entitled to the relief given under the
decree. It is to be noted under the general prayer of the com-
plaint and set on the specific prayer that said judgment be dissolved
a valid and existing judgment against complaintant. The decree is
based entirely upon the court's finding that said judgment is a
just and legal obligation of complaintant which with interest amounts
to \$3750.00, which is hereby shall be paid within 10 days of
the decree; in other words on the theory that said judgment is

binding upon complainant and may be enforced against it. In this we cannot concur. If appellant is liable to appellee under the allegations and proof it can only be on the theory that the judgment is a debt of the defunct corporation which appellant assumed to pay. For such relief appellee had a remedy at law by suit, not upon the judgment, but upon the promise under said assumption, and to support such an action might appropriately introduce the judgment as evidence of a debt for which appellant was liable. But under the circumstances and state of the record should appellee now be relegated to the formality of an action at law? We think not. Inasmuch as complainant in its bill admits it assumed the legal debts and liabilities of the defunct corporation and offers therein to pay appellee what, if anything, the defunct corporation legally owed the bank on December 17, 1919, and said note was then outstanding and a legal obligation of the defunct corporation and has since been merged into said judgment, and complainant has unsuccessfully assumed the burden of impeaching said judgment and the validity of the note on which it is based, in other words, has sought under its bill to adjudicate its liability for the debt the judgment represents, regardless of whether such judgment could be enforced against it, and has thus raised as an issue whether it is liable to the bank for the indebtedness evidenced by said judgment, and did not demur to the cross-bill, complainant is in no position, after going to trial on the issue it has made, to question the propriety of the decree fixing its liability and the amount thereof. We think, therefore, this part of the decree may stand under the general prayer for relief. The finding, however, should be liability for the debt represented by the judgment and not for the judgment itself. The decree must be reversed with ^{and procedure} direction for modifications/in accordance with the views expressed

...in ... upon complaint and may be ...
... we cannot ... If applicant is liable to ...
... the ... and ... is ... on the ... that the
... is a debt of the ... which applicant
... to pay. For such ... had a ... of law ...
... upon the ... but upon the ... which said
... and to support such an action might ...
... the judgment an evidence of a debt for which applicant
... was liable. But under the circumstances and state of the record
... should applicant now be ... to the ... of an action of
... we think not. Inasmuch as complaint in the ...
... it assumed the legal debt and liability of the ...
... and others therein to pay applicant who, if anything,
... the ... legally owed the ... on December 17, 1912
... and said note was then outstanding and a legal obligation of the
... and has since been ... into said judgment.
... and ... has unconstitutionally ... the burden of judgment
... said judgment and the validity of the note on which it is based.
... in other words, has sought and its bill to ... the liability
... for the debt the judgment represents, regardless of whether such
... judgment could be enforced against it, and has thus raised an
... issue whether it is liable to the bank for the ... evidence
... by said judgment, and did not ... to the ... complaint
... to the question, after going to trial on the issue it was made
... question the propriety of the decree ... the liability and the
... amount thereof. ... this part of the decree may
... stand under the general prayer for relief. The finding, however,
... should be liability for the debt represented by the judgment and
... not for the judgment itself. The decree must be reversed with
... and procedure
... in accordance with the views expressed

herein, so as to contain proper findings and giving the relief to which complainant was entitled under its bill, as aforesaid. But the relief, prayed for by injunction against the bailiff of the Municipal court, who is alleged to have served the execution on appellant, cannot be granted without service of summons or his appearance in the case, and giving him an opportunity to plead. While he is named as defendant to the bill he does not appear to have been summoned or in any way brought into the case.

We find no basis in the record for complainant invoking the doctrine of contribution among creditors or the defense of equitable estoppel, nor for the contention that appellee was compelled to resort to the power given to sell the collateral note. There can be no doubt that one of the remedies of the creditors in such a case is to bring suit upon the collaterals themselves. (Peacock v. Phillips, 847 Ill. 467, 472.)

This is not a case where a stranger to a judgment sought to be enforced against him seeks to impeach it for fraud or collusion. The attack upon the judgment is on different grounds and the proof does not sustain them, even if on such grounds it is open to collateral attack.

REVERSED WITH DIRECTIONS FOR
MODIFICATION OF THE DECREE.

Gridley and Seanlan, JJ., concur.

ELLEN MOORE,
Appellant,

v.

CHICAGO SURFACE LINES
et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff's claim was for damage to her taxicab caused by alleged negligence in the operation of one of defendants' cars. Defendants denied negligence, and claimed the injury was due to the negligent manner in which the taxicab was being managed and driven.

The trial was without a jury and the court found defendants not guilty. From a judgment of nil capiat plaintiff appealed. The accident happened, according to the preponderance of evidence, at the north side of the intersection of 37th street (running east and west), and Indiana avenue (running north and south), Chicago, just before eight p. m., February 20, 1927. It is stipulated that the amount of damages is \$164 for the repairs of plaintiff's taxicab, and it is not disputed that it was run into by one of defendants' cars. There was no evidence that legitimately tended to sustain contributory negligence on the part of plaintiff's driver, and we think the clear preponderance of the evidence showed negligence on the part of defendants.

The car tracks were on Indiana avenue and defendants' motor car was being driven southward at the time of the collision. The weight of the evidence is clearly to the effect, we think,

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2481 - 2482

WILLIAM HENRY
Appellant
COURT OF CHICAGO
CHICAGO BARBARA LANE
et al.

MR. PRESIDING JUDICIAL HARRIS
RECEIVED THE OPINION OF THE COURT.

Plaintiff's claim was for damage to her husband's car
by alleged negligence in the operation of one of defendant's cars
defendant denied negligence, and claimed the injury was due to
the negligent manner in which the vehicle was being managed and
driven.

The trial was at about a jury and the court found before
that was guilty. From a verdict of all plaintiff's expenses
The plaintiff's expenses, including the cost of the car, the cost of
of the car, the cost of the car, the cost of the car, the cost of the car,
and west), and Indiana Avenue (running north and south), Chicago,
just before eight p.m., February 20, 1937. It is stipulated that
the amount of damages is \$100 for the repairs of plaintiff's
vehicle, and it is not disputed that it was run into by one of
defendant's cars. There was no evidence that negligently caused
to sustain contributory negligence on the part of plaintiff's
driver, and we think the clear preponderance of the evidence shows
negligence on the part of defendant.
The car license was on Indiana Avenue and defendant's
motor car was being driven southward at the time of the collision.
The weight of the evidence is clearly in the effect, we think,

that plaintiff's taxicab was standing at such intersection back of a "Hudson" car waiting for the east and west traffic to pass on 37th street. Plaintiff's driver testified to that effect, as did also four other witnesses, two of whom were driving east through the intersection on 37th street, and two of whom stood on the northwest corner of the intersection. They all testified to hearing the crash and seeing the taxicab pushed by the motor car immediately afterwards at said intersection. The testimony of the motorman, and a passenger on the car, to the effect that the collision took place 100 feet north of the intersection is not supported by any other witness, and the motorman's testimony to the effect that the taxicab was going faster than the motor car is inconsistent with any described circumstances of the accident. Much of the testimony of defendants' two witnesses related to the movements of the respective vehicles for a block or two before the collision, and had no direct bearing on what took place at the time of the collision. If, as plaintiff's evidence shows, traffic had been suspended on the north and south street to permit the passing of traffic on the east and west street and defendants' car came up against plaintiff's taxicab either while it was standing waiting for the clearing of traffic or when it was just about to reach there, there would seem to be no excuse for the collision unless plaintiff's taxicab pushed in ahead of defendants' car just as it was about to reach the intersection, a theory the evidence does not support. The court seems to have decided the case upon the theory that plaintiff's four witnesses did not actually see the collision, but were first attracted to it by hearing the crash. While we do not think the evidence justifies that conclusion, it is uncontroverted that they

that plaintiff's taxicab was standing at such intersection when
of a "Hudson" car waiting for the east and west traffic to pass
on 27th street. Plaintiff's driver testified to that effect, and
did also four other witnesses, two of whom were driving south
through the intersection on 27th street, and two of whom stood
on the northeast corner of the intersection. They all testified
to hearing the crash and seeing the taxicab pushed by the motor
car immediately afterwards at said intersection. The testimony
of the witness, and a passenger on the car, as the effect that
the collision took place 100 feet north of the intersection and
not suggested by any other witness, and the witness's testimony
is the effect that the taxicab was being pushed after the motor
car is inconsistent with any described circumstances of the
accident. Much of the testimony of defendant's two witnesses
related to the movements of the respective vehicles for a block
or two before the collision, and had no direct bearing on what
took place at the time of the collision. It, as plaintiff's
evidence shows, traffic had been suspended on the north and south
street to permit the passing of traffic on the east and west
street and defendant's car came up against plaintiff's taxicab
either while it was standing waiting for the clearing of traffic
or when it was just about to reach there, there would seem to be
no reason for the collision unless plaintiff's taxicab pushed in
ahead of defendant's car, just as it was about to reach the
intersection, a theory the evidence does not support. The court
seems to have decided the case upon the theory that plaintiff's
four witnesses did not actually see the collision, but were there
attested to it by hearing the crash. While we do not think the
evidence justifies that conclusion, it is understood that they

heard the crash, which immediately attracted their attention, and they were at the intersection at the time, so if the crash took place right at the intersection, as they testified, when traffic on the north and south street had been suspended, it would indicate a recklessness in the driver of the motor car in not having better control of the car as he approached the intersection where cars were waiting for a clearing of the east and west traffic.

Accordingly, differing, as we do, with the trial court as to the weight of the evidence, we reverse the judgment and enter one for the \$164 with a finding of facts.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE FOR \$164.

Gridley and Scanlan, JJ., concur.

...the driver, which immediately attracted their attention, and they were at the intersection at the time, so it was clear that each place right at the intersection, as they testified, when traffic in the north and south streets had been suspended, it might indicate a recklessness in the driver of ... in not having ... information ... and was ...

Accordingly, offering, as we do, with the trial court as to the weight of the evidence, we reverse the judgment and enter one for the defendant with a finding of facts.

REVEREND WITH FINDING OF FACTS
AND JUDGMENT HERE FOR 1904.

Attorney for Plaintiff: J. J. ...

...of the ...
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274 - 32215

FINDING OF FACTS.

We find that defendants were guilty of negligence in the operation of their motor car causing the injury complained of, and that plaintiff was not guilty of contributory negligence.

STATE OF TEXAS.

That the defendant was guilty of negligence in the operation of their motor car causing the injury complained of, and that plaintiff was not guilty of contributory negligence.

283 - 32224

RALPH L. SORE et al., Trustees,
Complainants.

v.

CHARLES W. LELAND et al.,
Defendants.

APPEAL FROM

CIRCUIT COURT,

SOUTH SIDE TRUST AND
SAVINGS BANK, a corporation,
as Trustee, etc.,
Appellant,

COOK COUNTY.

v.

JOHN S. SMITH,
Appellee.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

In certain proceedings had in the cause below for reforming a trusteeship under the last will and testament of Isabel C. Leland, a decree was entered substituting for trustees named in the will the South Side Trust & Savings Bank, appellant herein, as the sole corporate trustee of the trust estate, which included a certain piece of real estate. The decree retained jurisdiction of the cause, the parties thereto, and the substituted trustee for the administration of the trust estate under the supervision of the court. In the exercise of its duties the trustee procured a broker to find a buyer for the real estate, who brought in appellee, John S. Smith, as a prospective purchaser. Subsequently, on October 29, 1926, Smith wrote a letter to the trustee offering \$85,000 for the property and stating that as he understood it would be necessary to consult other parties and to submit the proposal to the court,

THESE THINGS ARE

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his offer would stand for thirty-one days. Later he consented to an extension of time to December 20th on certain conditions. On December 14, 1926, the trustee filed a petition in the cause setting up the facts as to said offer, to which Smith and interested parties to the cause were made respondents, praying for a rule on each to answer, and for the court's directions, and that said Smith be required to comply with and perform on his part all orders and decrees as may be entered upon such matters. On the same day answers of all respondents except Smith were filed and a decree was entered on the petition authorizing the trustee's acceptance of the offer, giving it discretion in certain matters of detail, and ordering a summons on Smith to appear and answer. A summons followed and at the January term Smith answered setting up in effect that he had made the offer under certain misrepresentations of fact by the petitioner's representative and that by reason thereof he was unable to finance the purchase and the erection of the building contemplated, and asked to be dismissed from the case.

The parties came before the court April 6, 1927, for a hearing. No evidence was taken, and the chancellor, after hearing the statement of counsel for petitioner as to the trustee's position, said in substance that it was sufficient for an order to state that "having reviewed the facts, the court finds there has been a refusal to proceed with said contract, and the trustee is directed and authorized in his discretion to bring suit."

For some reason petitioner did not see fit to accept the court's suggestion and have an order entered accordingly, but later on July 5, 1927, brought the matter before another chancellor of the court on another petition for instructions

his offer would stand for thirty days. Later he requested
to an extension of time to December 1934 on certain conditions.
On December 14, 1934, the trustee filed a petition in the same
court setting up the facts as to said offer, to which Smith and
interested parties to the same were respondents, praying
for a rule on each in answer, and for the court's decision,
and that said Smith be required to comply with said petition on
his part and orders and decrees as may be entered upon same.
On the same day answers of all respondents except
Smith were filed and a decree was entered on the petition
authorizing the trustee's acceptance of the offer, giving it
disposition in certain matters of detail, and ordering a summary
on Smith to appear and answer. A summary followed and at the
January term Smith answered setting up in effect that he had
made the offer under certain misrepresentations of fact by the
petitioner's representative and that by reason thereof he was
unable to finance the purchase and the execution of the building
contemplated, and asked to be dismissed from the case.
The parties came before the court April 1, 1935, for
a hearing. The trustee and Smith were present, and the
trustee presented the statement of account for petitioner as to the trustee's
fees, and the court ordered that the same be paid to the trustee.
The court then reviewed the facts, the court found there
has been a refusal to proceed with said contract, and the trustee
is distressed and authorized in his discretion to bring suit.
For some time in petitioner did not use his right to
the court's suggestion and have an order entered on accordingly
for him to file a statement of account for the trustee's fees.
The court then ordered that the same be paid to the trustee.

calling the court's attention to the previous petition and answers thereto, and alleging that said Smith by failing and refusing to carry out his contract "without any grounds or excuse" had committed a contempt of court and caused damages to the trust estate by imposing a liability on the trustee to pay a brokerage fee, and by incurring expenses for its services and those of its attorney in the matter. The petition also included as damages interest on the proposed purchase price "from a reasonable date" etc.

A week later, on July 12, petitioner filed a motion for a rule on said Smith to show cause why he should not be held in contempt for failing and refusing to perform said contract, and "why a fine should not be assessed and adjudged against him in the amount of the loss and damages caused to said trust estate," and asked that the court proceed forthwith to assess and adjudge such fine against him and "award the same to this petitioner in reparation of the loss and damages so caused."

The matter came up for consideration the same day. A transcript of the discussion before the former chancellor was read but no evidence was heard and none was offered except by petitioner to prove damages. The court on reviewing said petitions, answers and prior proceedings, declined to receive such offer and entered the order appealed from, denying and dismissing the petition of July 5, 1927, insofar as it seeks the assessment of a fine and damages against Smith, and the motion for a rule on him to show cause, and dismissing respondent Smith from the cause and authorizing the trustee "in its discretion to proceed in a court of law for the recovery of damages against said John S. Smith, or to prosecute an appeal from this decree, or to abandon its rights and claims in the premises, as it may be advised and elects," etc.

...the court's decision to the previous position and ...
...and alleging that said ...
...without any grounds or excuse ...
...to the ...
...by the ...
...in the ...
...on the proposed ...

...A week later, on July 12, petitioner filed a motion for
...to show cause why he should not be held in
...to perform said contract, and
...a fine should not be assessed and judgment against him in
...the amount of the loss and damages caused to said ...
...and asked that the court proceed forthwith to arrest and adjudge
...each time against him and toward the same to this petitioner in
...regardless of the fact and damage to himself.

...The matter came up for consideration the same ...
...of the district before the former chancellor was
...and no witness was heard and none was offered except by
...The court on reviewing said
...petition, answers and prior proceedings, ...
...and entered the order appealed from, ...

...the motion of July 5, 1937, ...
...of a fine and damages against ...
...to show cause, and demanding judgment with ...
...in the ...
...for the recovery of damages against said
...on appeal from this decree, or to
...and claims in the ...
...and costs," etc.

It is apparent that the court did not regard the averments in any of the presented papers as constituting a contempt of its authority or a wilful trifling with its powers, but merely viewed them as presenting a state of facts for which the trustee might possibly have an action at law for damages, leaving, however, such a course to the trustee's judgment and discretion. It is somewhat strange that in pursuance of its scrupulous regard for keeping "under the wing of the court" and seeking its directions in a matter under its supervision, the trustee should apparently reject its advice and seek by appeal to force the court to recognize as an indignity and offense what it evidently, and properly in our opinion, did not regard as such.

But the question is, in what respect did the court err? If the court was not disposed to treat respondent's attitude as one of offense to the court nor one rendering a bill for specific performance advisable, but deemed a court of law the proper forum for the trustee to make its claim for damages and authorized it to proceed therein at its discretion, it is difficult to perceive how the trust estate or the trustee was in any way injured or embarrassed. The estate was not injured by the order nor the trustee subjected to any individual liability. If the estate was damaged by respondent's withdrawal from the contract the order left the trustee free to pursue his remedy at law with the sanction of the court having jurisdiction of the trust.

Whether or not the court may have exercised jurisdiction over respondent Smith on the theory advanced that as a proposed purchaser of property to whom the court authorized its sale, he submitted himself to its jurisdiction and on refusal to carry out his contract might be compelled to do so, or to pay a fine

It is apparent that the court did not regard the
statements in any of the presented papers as constituting a
violation of its authority or a wilful violation of its power.
But merely allowed them as presenting a case of fact for which
the trustee might possibly have an action at law for damages.
However, such a course to the trustee's judgment and
discretion. It is somewhat strange that in pursuance of its
jurisdiction regard for keeping "under the wing of the court"
and seeking its direction in a matter under its supervision,
the trustee should apparently reject its advice and seek by
appeal to force the court to recognize an individuality and otherwise
what is evidently, and properly in our opinion, did not regard
as such.
But the question is, in what respect did the court act?
If the court was not disposed to grant respondent's petition as
one of defense to the court may one rendering a bill for specific
performance obligatory, but deemed a court of law the proper forum
for the trustee to make the claim for damages and satisfaction it is
granted therein at the discretion, it is at least so protective
has the trust estate or the trustee was in any way injured or
deprived. The estate was not injured by the order nor the
trustee subjected to any individual liability. If the estate was
deprived by respondent's withdrawal from the contract the trustee
left the trustee free to pursue his remedy at law with the trustee
of the court having jurisdiction of the trust.
Whether or not the court may have exercised jurisdiction
over respondent which on the theory advanced that as a proposed
purchase of property to which the court might have jurisdiction the estate, he
submitted himself to its jurisdiction and on refusal to carry
out his contract might be compelled to do so, or to pay a fine

in way of damages, it is unnecessary to consider. Even if the court had such jurisdiction it was no abuse of its discretion that it refused to exercise it.

One of the points made by appellant is in the language of the court in Feldman v. American Palestine Line, Inc., 18 F. (2d) 749: "The sole question is whether a contempt of court was committed. If a contempt was committed there is no doubt that the court may fine a contemnor and may direct such fine to be paid to the injured party as damages, including as such reasonable attorneys' fees and expenses." Several Federal cases are there cited in support of the doctrine which counsel seeks to apply to the facts of this case. But if we may disregard the proceedings required in this State for contempt of court, and assume the doctrine might be applied in a proper case, it certainly would be carrying it to extreme length to hold that it was compulsory upon the court to grant the rule or hear evidence when on the face of the pleadings the court in the exercise of a wise discretion deemed it unnecessary. In this view of the case the question of the extent of the power of the court in the premises becomes an academic question. The order appealed from will be affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

in way of answer, it is unnecessary to consider, even if the court had such jurisdiction it was no abuse of its discretion that it refused to exercise it.

One of the points made by appellant is in the fact of the court in Reid v. Reid, 100 N. H. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Griffith and Corbin, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

248 I.A. 649

310 - 32251

JOSEPH D. SCHMIDT et al.,
Appellees,

v.

F. S. HENDRICKS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs, owners of an apartment building, sued defendant, their agent, for money withheld from rents collected by him on the leases thereof. In a statement of account rendered by defendant in August, 1925, on his leaving plaintiffs' employ, he deducted from the rents collected \$156.82 claimed as a commission on unexpired leases of the building negotiated by him.

The case was tried before a jury which rendered a verdict in favor of plaintiffs for \$156.82, and from a judgment for that amount this appeal is taken.

The main contention of appellant is that the receiving by plaintiffs of the statement in question, together with his check for the balance due them less his said claim for commissions, constituted an accord and satisfaction. But we find no basis for that claim, or that it was even made in the court below. There was no previous or existing dispute over the question of compensation on which to predicate the doctrine, and plaintiffs did and said nothing to indicate acquiescence in the claim.

The controlling question is whether appellant was

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO

THOMAS E. BURNETT of said
Appellant

(vs) (vs) (vs)

Y. S. BURNETT

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff, Thomas E. Burnett, vs.

Defendant, Y. S. Burnett.

Plaintiff of this case is the father of the defendant. In a statement of
plaintiff's father by defendant in August, 1922, he was leaving

plaintiff's father, he collected from the rents collected

plaintiff's father as a commission on uncollected rents of the

plaintiff's father by him.

The case was tried before a jury which rendered a

verdict in favor of plaintiff for \$100.00, and from a judgment

for plaintiff this appeal is taken.

The main contention of appellant is that the prevailing

by plaintiff of the statement in question, together with his

case for the balance due from him his said claim for commission

constituted an agreed and established fact. But we find no basis for

that claim, or that it was even made in the court below. There

was no question of evidence raised over the question of

commission on which to question the doctrine, and plaintiff's

did not and could not be introduced as evidence in the case.

The controlling question is whether appellant was

justified in making a charge of three per cent on rents to be collected on unexpired leases. It appears that he had a written agreement with plaintiffs whereby he was to be paid three per cent on the rents to be collected by him which he was to deliver over to plaintiffs on or before the end of each month, less the deduction of three per cent thereon, and he was to prepare and draw up the leases necessary for the renting of the apartments. It contained no provision for payment of a per cent of rents on unexpired leases. The agreement was for a period of one year but had terminated April 4, 1924. Defendant, however, continued to act as such agent without any other agreement until August, 1925, when he handed over the statement and check in question, and terminated his agency because plaintiffs wished to have him rent to colored people.

The agreement was received in evidence over defendant's objection. But as the conduct of the parties indicated a continuance of their relations upon the same terms as to defendant's duties and compensation, as provided in the expired agreement, we think there was no reversible error, under such a state of facts, in receiving it in evidence as tending to show their understanding in regard to defendant's compensation. But regardless of whether the parties considered themselves bound by its terms after it had expired, in the absence of any other specific agreement or of any competent proof of a general custom allowing a broker or agent the right to a percentage of uncollected rents, especially when he voluntarily terminates the agency, defendant had no right to withhold such sum from rents he had collected.

Finding no reversible error we will affirm the judgment.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

invested in making a charge of three per cent on rents to be collected on unexpired leases. It appears that he had a written agreement with plaintiffs whereby he was to be paid three per cent on the rents to be collected by him which he was to deliver over to plaintiffs on or before the end of each month, less the deduction of three per cent interest, and he was to prepare and draw up the leased necessary for the renting of the apartments. It contained no provision for payment of a per cent of rents on unexpired leases. The agreement was for a period of one year but had terminated April 4, 1924. Defendants, however, continued to act as such agent without any other agreement until August 1925, when he handed over the statement and check in question, and terminated his agency because plaintiffs wished to have him rent to colored people.

The agreement was renewed in witness where defendant's objection. But on the contract of the parties involved a continuance of their relations upon the same terms as to defendant's duties and compensation, as provided in the expired agreement, we think there was no reversible error, under such a state of facts. In receiving it in evidence as tending to show their understanding in regard to defendant's compensation. But regardless of whether the parties considered themselves bound by its terms after it had expired, in the absence of any other specific agreement or of any competent proof of a general custom affecting a broker or agent the right to a percentage of actual netted rents, especially when the voluntarily terminated the agency, defendant had no right to withhold such netted rents he had collected.

That the reversible error as to the judgment.

Griffey and Lenz, J., dissent.

328 - 32269

HENRY J. KARCH,
Appellee,

v.

HENRY SCHRIK,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The declaration in this case consists of a special count and the common counts. The former is predicated upon a promise of defendant to pay plaintiff a commission of \$800 on a real estate transaction in which plaintiff procured a would-be purchaser on terms submitted by defendant, and which defendant refused to carry out.

Defendant filed a plea of general issue. The verdict and judgment were for \$800. This appeal followed.

Plaintiff knew at the time of the transaction that defendant was not, and did not purport to be, the owner of the real estate, but was merely acting as agent. The case thus reduces itself to the controverted issue whether defendant by conduct or express promise rendered himself personally liable for the claimed commission. The only evidence bearing on that issue was the testimony of one Brandise in behalf of plaintiff, and the testimony of defendant in his own behalf. Brandise was plaintiff's selling agent who negotiated the deal. Their versions of the conversations had respecting a commission are in direct conflict. It is a case, in our opinion, in which the circumstances lend weight to the probability of defendant's version of them.

WILLIAM J. HANCOCK, Appellant,
vs.
HENRY SCHMIDT, Appellant.

MR. JUSTICE JAMES

DELIVERED THE OPINION OF THE COURT.

The transaction in this case consists of a special agreement between the parties. The terms of the agreement are set forth in the complaint. The plaintiff seeks to recover the amount of \$1000 on the basis of the agreement. The defendant denies the agreement and claims that the plaintiff is not entitled to the money. The court finds that the agreement was made and that the plaintiff is entitled to the money. The defendant's denial is not supported by the evidence. The court awards the plaintiff the amount of \$1000. The defendant's appeal is dismissed. The court's decision is final.

The parties had had previous dealings. Defendant is president of a bank, and his son, John, its vice president. Defendant's brother-in-law, then in Europe, had given John, in some form not satisfactorily disclosed, authority to sell the property. Brandise said defendant told him that the owner had left a signed deed in blank. Defendant disclaimed having said so and said if Brandise had any such information he must have got it from John. It appears that on one occasion when Brandise came to the bank defendant told him of having his brother-in-law's property for sale and requested him to find a customer. Brandise testified to the effect that defendant then volunteered the statement, "I will pay you 5 per cent commission or \$800," and that later when he brought a prospective purchaser and talked of terms, he remarked to defendant: "Of course you will pay the commission on it," and defendant replied, "Yes." Defendant denied making such statements and testified that the only conversation with regard to commission was when about two weeks later, on a Sunday, Brandise came to his house and informed him that he had a purchaser on the submitted terms, and a signed contract; that a commission was then discussed and he told Brandise that he did not know whether his brother-in-law said anything about a commission, but that very likely he will pay, and must certainly know if he sells he should pay; that he requested Brandise to come to the bank the next day to see what papers they had; that Brandise asked for his signature to the contract and he replied that he did not own the land and could not be expected to sign it; that Brandise said the customers were waiting for it and he "must have a signature," and defendant then said: "If you must have a signature, then sign it yourself. I will not sign papers to land that doesn't belong to me;" that thereupon Brandise left.

The parties had had previous dealings.

President of a bank, and his son, John, the vice president, defendant's brother-in-law, then in Europe, had given John, in some form not satisfactorily disclosed, authority to sell the property. Defendant also defendant told him that the owner had left a signed deed in blank. Defendant disclosed having said

so and said it was not his own information he must have got it from John. It appears that on one occasion when defendant

came to the bank defendant told him of having his brother-in-law's property for sale and for asked him to find a customer.

Defendant testified to the effect that defendant then volunteered the statement, "I will pay you \$100,000 for the property."

and that defendant brought a prospective purchaser and that defendant remarked to defendant: "Of course you will pay him

something on it," and defendant replied, "Yes." Defendant denied making such statements and testified that the only conversation

with regard to transaction was when about two weeks later, on a Sunday, defendant came to his house and informed him that he had

a purchaser for the property, and a signed contract; that a memorandum was then drawn up, and he told defendant that

not even defendant's brother-in-law said anything about a transaction, but that very likely he will pay, and most certainly

and it is well known that he requested defendant to come to the bank the next day to see what papers they had; that defendant

called for his signature to the contract and he replied that he did not own the land and could not be expected to sign it; that defendant

said the documents were waiting for it and he "must have a signature," and defendant then said: "If you must have a signature,

then sign it yourself. I will not sign papers to land that doesn't belong to me," and defendant then signed the

It appears that when Brandise returned to plaintiff's office he signed the contract "Henry Schrik, by S. Brandise." It recited that "Henry Schrik, Agent," was the seller, that the seller "agreed to pay a broker's commission of \$800," and called for a warranty deed of the land. Defendant never knew until the day before the trial that Brandise had signed the contract.

The evidence on both sides tends to show that whatever authority was given to act for the owner was given to John, defendant's son, and that whatever papers there were relative to the matter, if any, were left with him, and that defendant was a mere volunteer in the matter. Brandise well knew, as did plaintiff, that defendant was merely undertaking to act in the capacity of agent, and he does not appear to have made any inquiry as to the extent of his authority or to have received any information with respect thereto except that the owner had left a deed signed in blank. He apparently did not even ask to see it.

It hardly seems probable that under such circumstances defendant would voluntarily assume a personal liability for \$800 unless his brother-in-law had undertaken to secure him in some way. His manifest unwillingness to sign the contract himself and thus render him liable is inconsistent with his voluntary assumption to pay the commission. His explanation why he would not sign is consistent with reason and far more plausible than the unqualified statement of Brandise that defendant read the contract and then told him to sign it. There was apparently no reason why, if intending to be bound thereby, he should not have signed it himself, and to have acted on that statement as qualified by defendant was unreasonable.

[illegible]

While defendant states that he did not read the contract it is hardly probable that he would have signed it in that form, reciting him as the seller, though as agent, when unwilling to bind himself as grantor and when he knew he had no authority to make a warranty deed as contemplated in the contract.

While Brandise testified that defendant informed him that a deed signed in blank had been left by the owner, defendant denied that he got any such information from him, but might have obtained it from John. Defendant's testimony that he did not read the contract but requested Brandise to call at the bank the next day to see what papers were left with his son is not only consistent with knowledge by both that some papers as to authority to sell or a deed had been left by the owner but more consistent with business methods a man in defendant's position would, under the circumstances, employ.

Where there is a direct conflict between persons of apparently equal credibility a jury should look to the circumstances of the case to determine which statement is the most reasonable and probable. From them we think defendant's version of the conversations is more compatible with reason and methods that would ordinarily be pursued among business men, and, therefore, we think the judgment should be reversed as against the weight of the evidence and the cause be remanded.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

While defendant agrees that he did not know the contents of the letter, he would have signed it in that form, receiving him as the writer, though he signed it in that form, and when he knew he had no authority to make a statement such as contained in the contract.

While defendant testified that defendant informed him that a check signed in blank had been left by the owner, defendant denied that he got any such information from him, but might have obtained it from him. Defendant's testimony that he did not read the check, but requested defendant to call on the bank the next day to see what papers were left with him is not only consistent with

with knowledge by both that some papers or so authority to call on a bank had been left by the owner but more consistent with defendant's testimony that he did not read the check, under the circumstances, and the

There is a direct conflict between the testimony of defendant and the testimony of the owner. The owner's testimony is that he did not read the check, but requested defendant to call on the bank the next day to see what papers were left with him is not only consistent with the testimony of the owner but more consistent with the testimony of the owner. The owner's testimony is that he did not read the check, but requested defendant to call on the bank the next day to see what papers were left with him is not only consistent with the testimony of the owner but more consistent with the testimony of the owner. The owner's testimony is that he did not read the check, but requested defendant to call on the bank the next day to see what papers were left with him is not only consistent with the testimony of the owner but more consistent with the testimony of the owner.

REVEREND AND HONORABLE

DAVID HAAS,
Appellee,

v.

JACOB COHN et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought by plaintiff as a licensed real estate broker against defendants for \$1000, as real estate commission, as provided in a contract of sale made a part of the statement of claim.

Said contract recited that \$2000 had been paid by the purchaser as earnest money, and in the event the deal was not consummated through the default of the buyer then \$1000 of the earnest money should be paid to the sellers and \$1000 to said Haas.

The defense was that the \$1000 was to be paid out of a special fund of \$2000, which defendants did not receive and the deal was not consummated.

A jury was waived and the cause heard by the court which found the issues against defendants and assessed plaintiff's damages at \$1000. From a judgment entered thereon this appeal was taken.

The facts are not in dispute. In lieu of earnest money the purchaser drew her check for \$2000, payable to the order of plaintiff, and stopped payment thereon. In fact the check was never delivered to defendants but was handed by plaintiff to the purchaser's attorney and was retained by the latter. In

100 - 1000

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA
IN RE: [illegible]
[illegible]

STATEMENT OF THE DEFENSE

This is a case brought by plaintiff as a libelous
and untrue statement against defendant. The facts are as
follows: It is stated in the complaint that on
a part of the statement of defendant.
Said defendant stated that \$1000 had been paid by
the plaintiff on account money, and on the same day
was not communicated through the receipt of the buyer when \$1000
of the account money would be paid to the seller and \$1000
as well.
The defense was that the \$1000 was to be paid out of a
special fund of \$2000, which defendant did not receive and the
[illegible] was not communicated.
The facts are as follows and the same were by the court which
found the same against defendant and assessed plaintiff's damages
at \$1000. From a judgment entered thereon this appeal was taken.
The facts are not in dispute. In fact of account money
the plaintiff drew her check for \$2000, payable to the order of
defendant, and stopped payment thereon. In fact the check was
never delivered to defendant and was handed by plaintiff to the
[illegible] and was retained by the latter. In

consequence thereof defendants did not receive any earnest money as recited in the contract, or even the check, and the deal was not consummated. Upon that state of facts it is apparent no judgment could be entered for plaintiff, whose right to a division of the earnest money manifestly depended upon receipt of the same. The suit is not based upon an agreement of defendants to pay plaintiff \$1000 as commission for his services as broker, but wholly upon a claim for something that never existed.

There being no evidence tending to support the cause of action the judgment will be reversed as a matter of law.

REVERSED.

Gridley and Mcanlan, JJ., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it has any plans to introduce legislation to give effect to the recommendations of the Commission.

AMERICAN FURNITURE & CARPET CO.,
a corporation,

Appellee,

v.

THOMAS W. PHILPOTT and
ARTHUR L. PHILPOTT, doing
business as Thomas W. Philpott
Co.,

Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit begun in replevin and later, with
leave of court, a statement of claim in trover was filed.

Upon the charge of trover the jury found defendants
guilty, and rendered a special finding of malice in converting
the goods.

Defendants were partners in the auction business.
The property charged to have been converted was purchased from
plaintiff by one Custer, now deceased, who gave back a chattel
mortgage thereon containing the usual provisions as to the
right of the mortgager to take possession on default, etc.
Plaintiff sent its agents to defendants' place of business to
get the property, consisting of a gas stove, dresser, bed and
springs. These agents, who were familiar with the property,
identified it as the property so mortgaged, notified Arthur
L. Philpott, whom they then saw and talked with, of said
mortgage and served upon him a written demand for the property
as described therein. They testified that Philpott then said
he got the property from Custer (whose wife also testified
that the property was sold to him), and that he said he would

COURT OF CHICAGO

business of Thomas W. Phillips
plaintiff

THE RESPONDING JUSTICE

THE OPINION OF THE COURT

This is a suit begun in response and later, with
leave of court, a statement of claim in trover was filed.
Upon the charge of trover the jury found defendant
guilty, and rendered a special finding of value in converting

Defendants were partners in the auction business.
The property charged to have been converted was purchased from
plaintiff by one Chester, now deceased, who gave back a check
mortgage thereon containing the usual provisions as to the
liability of the mortgagor to take possession on default, etc.
Plaintiff sent the agents to take possession of the property
and the property, consisting of a new stove, dresser, bed and
spring. These agents, who are familiar with the property,

... when the
mortgage and served upon him a writ in demand for the property
as recorded therein. They then filed that Chicago then said
he had the property from Chester (whose wife also testified
that the property was sold to him), and that he said he would

not let them have it until he saw a lawyer. His attitude was that of an implied refusal. A few days later the bailiff went to defendants' premises where they conducted their business and sought to take possession of the property under the writ, on which he made a return of service, demand, refusal and inability to find the property, and returned the writ unexecuted as to the property.

The testimony of Arthur Philpott to the effect that the property seen by them was there when the bailiff came to take it on the writ and that he did not take it because of his uncertainty as to its identity, furnished no defense to the charge of conversion, and had little bearing on the question of identity. It is not controverted that the property was sold by defendants in the regular course of their business, thus under such circumstances constituting a wilful conversion. Philpott denied that he admitted he obtained the property from Custer and claimed that he obtained it from the Illinois Central Railroad. There was no corroborative proof of this claim, however.

The evidence clearly tended to support the claim of conversion and liability of defendants therefor. But there was reversible error. Several points are urged for reversal, only one of which we deem good. Plaintiff made proof that the valuation of the property was \$333. Defendants undertook to make proof of its value but the court sustained an objection to a proper question for such proof. On further questioning one of the defendants testified to the value of two of the pieces of property when objection was again made, and the court, without expressly ruling thereon, indicated as its view that defendants

and let them have it until he saw a lawyer. His opinion was
that of an implied warranty. A few days later the plaintiff went
to defendant's premises where they conducted their business and
sought to take possession of the property under the writ, on
which he made a return of service, amount, return and liability
to find the property, and returned the writ unsatisfied as to
the property.
The testimony of Arthur Halliwell to the effect that
the property was by them was that when the writ came to
take it on the writ and then he did not take it because of his
uncertainty as to its identity. He furnished no return to the
change of conversation, and had little to say on the question
of identity. It is not controverted that the property was sold
by defendant in the regular course of their business, that
under such circumstances concerning a will in conversation.
Halliwell denied that he admitted he obtained the property from
Gaster and claimed that he obtained it from the Illinois Central
Railroad. There was no corroborative proof of his claim, how-
ever.
The evidence clearly tended to support the claim of
conversion and liability of defendant's executor. But there was
reversible error. Several points are urged for reversal, only
one of which we deem need. The plaintiff made great deal of
valuation of the property was \$500. Defendant made good to
make good of the value but the court made an objection to
a proper question for such proof. On further examination and
of the defendant's testimony to the value of one of the pieces
of property when objection was again made, and the court, without
expressly ruling thereon, indicated as its view that defendant's

could not offer evidence of its value because they claimed to have obtained it from a different source. While by reason of this erroneous view of the court defendants offered no further proof of values, nevertheless the testimony of a different value than that placed by plaintiff remained in the record, and therefore was for the consideration of the jury. It was, therefore, error for the court to instruct the jury that if they found the defendants guilty they should assess the damages at \$588, the sum fixed by plaintiff's evidence. For that error we must reverse the judgment and remand the cause for a new trial.

While in view of the necessity of a reversal we need not discuss the other assignments of error, such as are purely technical may be obviated upon another trial.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

... 11/11/11 ...
... and offer evidence of the value because they claimed to
have obtained it from a different source. While by reason
of this erroneous view of the court defendants offered no
evidence of value, nevertheless the testimony of
defendants value than that claimed by plaintiff remained in this
case, and therefore the court found in favor of the
defendants. It was held that the value of the property was
that it was found to be worth \$100,000.00. The court
found that the value of the property was \$100,000.00.
The court found that the value of the property was \$100,000.00.
The court found that the value of the property was \$100,000.00.

While in view of the necessity of a reversal we need
not discuss the other assignments of error, such as are purely
technical and do not require a reversal of the judgment.

REVEREND AND HONORABLE

Very respectfully,
[Signature]

351 - 32292

ILLINOIS INTERIOR FINISH CO.,
a corporation,

Appellee,

v.

DANIEL M. O'NEIL and
HAROLD J. HAM, copartners,
doing business as D. M. O'Neil
& Co.,

Defendants.

ON APPEAL OF DANIEL M. O'NEIL,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

In this action plaintiff claims \$1331.20 as a balance due it from defendants, as copartners, for material furnished to them on certain jobs according to accounts set forth in the statement of claim.

Defendant Ham was not served with process, and a trial on the issues resulted in a verdict and judgment against O'Neil for \$1300. He appeals.

While the statement of claim unnecessarily sets forth balanced accounts on certain other jobs the balance sued for is made up of a balance of \$1242.20 for furnishing mill work to defendants for a construction job on Ellis avenue, Chicago, a balance of \$55.05 for material furnished for a construction job on Resax avenue, Chicago, and a balance of \$54.05 on a certain "miscellaneous" account.

Defendants were copartners in the construction work on said jobs, for which plaintiff furnished the mill work, and

248 I.A. 650

APPEAL FROM MUNICIPAL
COURT BY CHICAGO.

ILLINOIS JUDICIAL REVIEW CO.,
a corporation,
Appellant.

DANIEL M. O'NEILL and
HAROLD J. HALL, respondents,
doing business as D. M. O'Neill
& Co.,
Respondents.

IN COURT OF DANIEL M. O'NEILL,
Appellant.

THE JUDICIAL REVIEW BOARD
THE JUDICIAL REVIEW BOARD

In this action plaintiff claims \$100.00 as a balance
due it from defendant, as respondent, for material furnished to
them on certain jobs now being done for it in the
statement of claim.

Defendant has not served with process, and a writ
on the issues resulted in a verdict and judgment against O'Neill
for \$100.00. He appeals.

While the statement of claim unnecessarily sets forth
balanced accounts on certain other jobs the balance due for in
made up of a balance of \$100.00 for furnishing mill work to
defendant for a construction job on Ellis Avenue, Chicago, a
balance of \$50.00 for material furnished for a construction job
on Ellis Avenue, Chicago, and a balance of \$50.00 on a certain

defendant was respondent in the construction work
on said jobs, for which plaintiff furnished the mill work, and

the Illinois State Lumber Company furnished the lumber.

The materiality of evidence is not argued here and no question is raised here as to the sufficiency of the evidence showing the delivery and prices of materials furnished by plaintiff making up the accounts sued on. The questions argued are (1) whether appellant O'Neil was exempt from liability on said accounts; and (2) whether his firm received the credits due it.

It appears that statements of the several accounts were rendered monthly to defendants' firm at its place of business, the active work in which was left to defendant Ham, apparently without restriction by his partner O'Neil, who gave little attention to it and whose time was taken in conducting a separate personal business at his residence. The business relation between the firm and plaintiff began before April, 1924, and continued up to the autumn of 1925. On April 12, 1924, O'Neil wrote a letter to each of the companies at their common place of business purporting to confirm an alleged conversation with one of their agents, saying that he would be responsible for all bills contracted by the firm in any one month, provided a statement showing the amount not paid for material purchased in the preceding month was sent to his residence before the 15th day of the following month, and otherwise he would not. Whether such a conversation was had or the letter was received were controverted facts, which may well be left to the jury's verdict.

But regardless of whether the conversation was had or the letter received it appears that for a year and a half after that time O'Neil's firm continued to do business with plaintiff, and received monthly statements of the account, that O'Neil from time to time had conferences with his partner Ham with regard to

The Illinois Lumber Company furnished the lumber.

The materiality of evidence is not argued here and no

question is raised here as to the sufficiency of the evidence

showing the delivery and prices of materials furnished by plain-

tiff making up the accounts and so. The questions argued are

(1) whether appellant O'Hall was exempt from liability on said

accounts; and (2) whether his firm received the credits due it.

It appears that statements of the several accounts were

rendered monthly to defendant's firm at its place of business.

The native work in which was left in defendant's firm, apparently

without restriction by his partner O'Hall, who gave little attention

to it and whose time was taken in conducting a separate personal

business at his residence. The business relation between the firm

and plaintiff began before April, 1934, and continued up to the

summer of 1934. On April 12, 1934, O'Hall wrote a letter to each

of the companies of their common class of business purporting to

cancel an alleged partnership with him in that business.

That he would be responsible for all bills contracted by the firm

in any one month, provided a statement showing the amount not paid

for material purchased in the preceding month was sent to him

within the first day of the following month, and otherwise

he would not. Plaintiff made a conversation and had on the

letter was received were constructed facts, which may well be

left to the jury's verdict.

That negation of whether the conversation was had or

the letter received is apparent from the fact that a half letter

that time O'Hall's firm continued to do business with plaintiff,

and rendered monthly statements of the account, that O'Hall from

time to time had conferences with his partner Han with regard to

the firm's affairs, was familiar with many of the contracts of the firm, knew of the contracts in question, and himself paid money on some of the firm's accounts. The partnership was not dissolved until May or June, 1926, up to which time he had such conferences with his partner and if he did not know he was chargeable with knowledge of the statements of account the firm received from plaintiff. He did not repudiate them or prohibit his partner from incurring further liabilities. He impliedly waived the conditions of his letter, if received, and assented to the exercise of authority by his partner to incur the debts.

It appears that about two months after the firm ceased doing business with plaintiff O'Neil for the first time asked plaintiff for a statement of the account and after receiving it gave plaintiff an order to collect some money coming to defendants on the Essex avenue job. The inference from the evidence is that he either knew or was chargeable with the status of the firm's account sent to his partner each month and allowed the firm to incur the liabilities without objections thereto either to his partner or creditors. So long as he did not attempt to restrict his partner's authority to contract debts, either by the letter or otherwise, he was bound by the contracts. Apparently willing to accept any profits that might accrue from the contracts he is hardly in a position to repudiate liability thereon. We think, therefore, the jury were justified in finding O'Neil assented to the dealings made with his firm whereby it incurred liability on the accounts in question.

It appears that on an order from Ham to Flynn, the owner of the building in construction on Ellis avenue, the latter gave a check on May 26, 1926, to plaintiff's order for \$953, and at the same time plaintiff executed a waiver of lien on the premises,

the firm's affairs, was familiar with many of the contracts of
the firm, knew of the contracts in question, and himself paid
money on some of the firm's accounts. The partnership was not
dissolved until May or June, 1934, up to which time he had been
conferencing with his partner and if he did not know he was sharing
this with knowledge of the statements of account the firm received
from plaintiff. He did not repudiate them or prohibit his partner
from insuring further liabilities. He implicitly waived the con-
dition of his letter, if received, and assented to the exercise
of authority by his partner to incur the debts.
It appears that about two months after the firm ceased
doing business with plaintiff O'Neil for the first time called
plaintiff for a statement of the account and after receiving it
and plaintiff's name in stated and signed and returned the statement
on the stated account for
that he did know or was chargeable with the status of the
firm's account sent to his partner each month and allowed the firm
to incur the liabilities thereon, and that thereby either to his
partner or plaintiff. He said as he did not attempt to restrict
his partner's authority to contract debts, either by the letter
or otherwise, he was bound by the contracts. Apparently willing
to accept any profits that might come from the contracts he is
bound in a position to repudiate liability thereon. He thinks
therefore, the jury were justified in finding O'Neil warranted to
the dealings made with his firm whereby it incurred liability on
the account in question.
It appears that on an order from him to plaintiff, the owner
of the building in connection on Ellis Avenue, the latter gave
a check on May 22, 1934, to plaintiff's order for \$500. and at the
same time plaintiff executed a waiver of lien on the premises.

but applied \$215.06 of said check on a note charged to defendants in the miscellaneous account. Whether credit for \$215.06 was given to one account or the other did not affect the total balance of defendants' indebtedness sued for.

But there is evidence of authority from Ham to apply credits at plaintiff's discretion both on the miscellaneous account, and on defendants' indebtedness to the Illinois State Lumber Co., with which the firm also had an account for lumber furnished on the same jobs. Flynn also gave a check for \$1060.37, payable to the order of the Illinois State Lumber Co. which specified that it was for material delivered for construction on the Ellis avenue building. There was some testimony to the effect that this check covered also some mill work furnished by plaintiff. There is no evidence to show that any particular part of the amount of that check was intended to be credited to defendants' account with plaintiff. While the two companies were separate entities they did business with the same customers from the same offices through the same agents, and had a way of distributing payments made by a common customer to the accounts of each with said customer, and, as the evidence tends to show, with Ham's knowledge and acquiescence. The result was that by common consent and practice payments for the accounts of both companies with the same customer were so adjusted that he received full credit of the payments he made, whether to one company or the other.

It does appear, however, that defendants were entitled to \$300 commission on a so-called Leavitt street job for which they should have received credit in the miscellaneous account. This was admitted by plaintiff's manager. In view of that admission defendants were entitled to a reduction of \$300 from the claimed balance

but applied \$100.00 of said check on a note charged to defendant
in the miscellaneous account. Another credit for \$100.00 was
given to one account or the other did not affect the total balance
of defendant's indebtedness and for.

But there is evidence of authority from him to apply
credits of plaintiff's disbursements on the miscellaneous account
and on defendant's indebtedness to the Illinois State Lumber Co.,
with which the firm also had an account for lumber furnished on the
firm's job. Firms also gave a check for \$1000.00, payable to the
order of the Illinois State Lumber Co. which specified that it was
for material delivered for construction on the Mill Avenue building.
There was some testimony to the effect that this check covered also
some mill work furnished by plaintiff. There is no evidence to the
effect any portion of the amount of that check was intended
to be credited to defendant's account with plaintiff. While the

two payments were suggested earlier they did business with the firm
and had a
relationship from the same office through the same agents, and had a
way of distributing payments made by a common creditor to the
accounts of each with said creditor, and as the witness seems to
show, with his knowledge and acquiescence. The result was that
by common consent and practice payments for the account of both
companies with the same creditor were so adjusted that no received
full credit of the payments he made whether to one company or the
other.

It does appear, however, that defendant was entitled to
\$500 commission on a so-called level street job for which they
should have received credit in the miscellaneous account. This was
admitted by plaintiff's manager. In view of that admission defendant
were entitled to a reduction of \$500 from the claimed balance

of \$1351.30.

If, therefore, plaintiff will remit down to \$1051.30, within ten days, the judgment will be affirmed for that amount. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

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[illegible]

... ..

ILLINOIS STATE LUMBER CO.,
a corporation,
Appellee,

v.

DANIEL M. O'NEIL and
HAROLD J. HAM, copartners,
etc.,
Defendants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

ON APPEAL OF DANIEL M. O'NEIL,
Appellant.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this case no service of summons was had on defendant Ham and the action proceeded against defendant O'Neil, resulting in a verdict and judgment against him for \$1118.85, the balance of an amount claimed as due plaintiff for lumber and material furnished to the firm of D. M. O'Neil & Co., of which said O'Neil and Ham were partners, between May 1 and September 24, 1926, as itemized in the statement of claim.

O'Neil's defense as relied upon at the trial and here is (1) that he was absolved from liability for failure of plaintiff to send him personally, at his residence, monthly statements of the account of the firm according to a written notice he claimed to have mailed plaintiff on April 26, 1924, to the effect that if it did not comply therewith he would not be responsible for the debts contracted by the firm; and (2) that the alleged indebtedness of the firm was paid but the payments were misapplied to other and prior accounts.

111 - 1111

ILLINOIS STATE JAILING CO.,
a corporation,
Appellant.

MUNICIPAL COURT
OF CHICAGO.

WILLIAM M. O'NEILL and
HAROLD E. WELLS, copartners,
Respondents.

ON APPEAL BY DANIEL M. O'NEILL,
Appellant.

MR. PRESIDING JUSTICE HARRIS
DELIVERED THE OPINION OF THE COURT.

In this case no notice of removal was put on defendant
him and the action proceeded against defendant O'Neill, resulting
in a verdict and judgment against him for \$1112.85, the balance
of an amount claimed as due plaintiff for lumber and material
furnished to the firm of D. M. O'Neill & Co., of which said O'Neill
and him were partners, between May 1 and September 24, 1923, as
itemized in the statement of claim.
O'Neill's defense as relied upon at the trial and here
is (1) that he was absolved from liability for failure of plain-
tiff to send him personally, at his residence, monthly statements
of the account of the firm according to a written notice he claimed
to have mailed plaintiff on April 26, 1924, to the effect that
it is his duty; that with he would not be responsible for the
debts contracted by the firm; and (2) that the alleged indebted-
ness of the firm was paid but the payments were misapplied to
other and prior accounts.

Whether such notice was given and whether it was not waived by O'Neil's subsequent conduct were questions of fact for the jury, and we would not be warranted in our view of the evidence to change their implied finding thereon against appellant. But we agree with appellee ^{that} / as Ham personally entered into the contracts in question, without proof of any restriction by O'Neil upon his right to do so as a member of the firm or of any notice to appellee of any such restriction, the mere fact that appellee did not comply with such notice but sent the statements of account to the firm at its place of business, did not exempt O'Neil from liability on the contracts entered into by the firm in the regular course of its business. The firm was engaged in construction work and O'Neil left the active work of making contracts and ordering material for the same to his partner Ham, both before and after the time he claims to have given plaintiff such notice, and the dealings between the firm and appellee continued until questions arose over the accounts in September, 1925.

No question is raised here as to the sufficiency of the proof to show that the firm of B. M. O'Neil & Co. ordered and received materials on the dates and at the prices stated in plaintiff's statement of claim. Nor was it denied that said firm received each month invoices and statements of account covering the specified items sued on.

But it is claimed that the items in question were covered by payments that were misapplied to prior accounts with either plaintiff or an associate corporation, Illinois Interior Finish Co. It appears that these two companies were conducted from the same office with common agents to some extent who contracted for each with the same customer, and with defendants in particular, and

that payments made to one were in some instances applied in part to the account of the other. There was proof, however, tending to show that Ham assented to this arrangement, and that it in fact made no difference as to the amount of defendants' liability on the particular jobs or the credits given thereon, it appearing what it did not owe one company it owed to the other. But while they were not joint accounts if the firm assented to their adjustment under such arrangement appellant can not now be heard to complain. The accounts of both companies are not before us and there is nothing to indicate from the evidence that defendants were injured by such arrangement.

However, it does not appear from the evidence that any specific payments made to plaintiff were applied to reduce the firm's indebtedness to the Illinois Interior Finish Co. On the contrary, it does appear that defendants received credit on plaintiff's account for checks made payable to the order of the latter company and therefore reduced the amount of its liability to plaintiff, an advantage of which appellant is in no position to complain.

However, appellant's complaint is reduced mainly to the contention that payments on the jobs in question were applied to a prior indebtedness. His counsel urges that the suit was not upon such prior indebtedness, and there was no legal proof that it existed. True, but neither did appellant deny its existence. The real point at issue was whether the payments of which appellant offered evidence were misapplied. They could not be so deemed if defendants had assented to such an arrangement. Besides, in the absence of any specific directions for their application, plaintiff, under well known principles, had the right to apply the payments to its other accounts with defendants.

that payments made to him were in some instances applied in part
to the account of the other. There was great, however, tendency
to show that was accounted to this arrangement, and that it is hard
made no difference as to the amount of defendant's liability on
the particular job or the specific given person, it appearing
that it is not one way company is used to the other. But while
they were not being accounts it the firm appeared to their subject-
ment under such arrangement applicant can not now be heard to
complain. The accounts of each company are not before us and
there is nothing to indicate from the evidence that defendant
was injured by such arrangement.

However, it does not appear from the evidence that any
specific payments were to plaintiff were applied to reduce the
firm's indebtedness to the Illinois Interior Finish Co. On the
contrary, it does appear that defendant received credit on plain-
tiff's account for checks made payable to the order of the latter
company and therefore reduced the amount of the liability to
plaintiff, an advantage of which applicant is in no position to
complain.

However, applicant's complaint is reduced mainly to the
contention that payments on the job in question were applied to
a prior indebtedness. It cannot be said that the suit was not
upon such prior indebtedness, and there was no legal ground that
it existed. But, but neither did applicant deny the existence
The real point at issue was whether the payments of which applicant
alleges were made were applied. They could not be so deemed if
defendant had accounted to such an arrangement. Besides, in the
absence of any specific evidence for their application, plain-
tiff, under well known principles, has the right to apply the
payments to its other accounts with defendant.

Two of the items aggregating a little over \$48 do not seem to be questioned. At least no specific claim was made that they had been paid. The real question is whether or not certain payments made directly to plaintiff at the request of Ham, by the respective owners or agents of the buildings under construction by defendants on Ellis and Essex avenues, should have been applied to the specific account for each building. The contract for each building was with defendants' firm and not said owners. That they paid was at the instance or on the order of defendants' firm and for their account.

With respect to the Ellis avenue account defendants offered the check of the owner of the building for \$800, dated April 23, 1925, and also an order by him on the Union Bank of Chicago, dated May 26, 1925, to pay plaintiff \$1060.37. As the first charge on the Ellis avenue account sued on was May 1, 1925, it is manifest, unless there was a specific arrangement therefor, which was not shown, that the \$800 check was not intended to apply on an indebtedness accruing subsequently, therefore the check was properly ruled out by the court. There were only four items aggregating \$34.40 on the statement of claim bearing a date prior to the check of May 26, 1925.

With respect to the Essex avenue account defendants offered three checks, one by the owner of the premises where the material was furnished, dated July 31, 1925, for \$2000, payable to plaintiff, a cashier's check dated September 16, 1925, for \$2700, payable to the Illinois Interior Finish Co., and another cashier's check dated October 16, 1925, for \$300, payable to the latter company. Plaintiff received some part of the last two checks. While it does not appear that defendants had a right to

Two of the items aggregating a little over \$400 to not seem to be questioned. As there is no specific claim was made that they had been paid. The real question is whether or not certain payments made directly to plaintiff at the request of him, by the respective owners or agents of the buildings under construction by defendant on Ellis and Essex avenues, should have been applied to the specific account for each building. The contract for each building was with defendant, firm and not said owners. That they will sue at the instance or on the order of defendant, firm and for their account.

With respect to the Ellis Avenue account, defendant offered the check of the owner of the building for \$800, dated July 22, 1935, and also an order by him on the Union Bank of New York City, dated May 25, 1935, to pay himself \$1000.00. As the first check on the Ellis Avenue account came on May 1, 1935, it is unlikely, unless there was a specific arrangement between the parties, that the \$800 check was not intended to apply on an indebtedness existing subsequently, therefore the check was properly paid out by the bank. There were only four items aggregating \$34.40 on the statement of claim bearing a date prior to the check of May 25, 1935.

With respect to the Essex Avenue account, defendant offered three checks, one by the owner of the premises where the material was furnished, dated July 21, 1935, for \$1000, payable to plaintiff, a cashier's check dated September 10, 1935, for \$1000, payable to the Illinois Interior Finish Co., and another cashier's check dated October 10, 1935, for \$2000, payable to the latter company. Plaintiff received some part of the last two checks. While it does not appear that defendant had a right to

expect credit on their account with plaintiff out of these checks, what it did receive from them was to defendants' advantage in reducing the account to the amount sued for.

The first item on the Essex avenue account is under date of July 2, 1925. The larger amount of the debits on that account sued for accrued subsequent to the date of said check. Defendants offered no other evidence of payment on the two accounts. In other words the payments referred to were applied to older accounts.

But it does not appear that if there was any misapplication of the credits defendants were injured, or that if they were readjusted on the basis of defendants' claim, or any other basis, the balance owing by defendants to plaintiff would be any less.

The payments made by the owner of the buildings as aforesaid with which defendants had contractual relations were manifestly made for defendants' account in order to secure waivers of mechanic's liens which were given as such payments were made. But, except as to such liens, there was no privity of contract or relations between said owners and plaintiff. Their contracts were with defendants, and such payments were made at their request and for their account.

But whether we consider the case from the point of view of the right of the creditor in the absence of specific directions from the debtor to control the application of payments made on defendants' accounts where the rights of third persons are not prejudiced, or from the evidence of an understanding of the parties and a consent of defendants to their application on other and older items of account than those involved in the

need. To the following this success should be given. Success
 'success' of the new method must be given. Success
 'success' of the new method must be given. Success

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suit, especially where it appears that the payments relied upon by defendants were made for the most part before the accrual of the items in the statement of claim, we think the evidence supports the verdict and the judgment.

Accordingly the judgment will be affirmed.

AFFIRMED.

Griddle and Scanlan, JJ., concur.

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LOUIS BELEGRADE,
Plaintiff in Error.

v.

LUMINUS SIGN CO., a corporation,
and NATHAN HERZOG,
Defendants in Error.

ERROR TO SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment for costs against plaintiff, entered November 21, 1925, after a verdict finding defendants in error not guilty, in an action for damages for malicious prosecution. Nathan Herzog was the office manager of the Luminus Sign Co. and Rudolph Wolfner was its attorney. The suit, as originally commenced on May 19, 1923, was against the sign Co., Herzog and Wolfner, but during the trial, at the close of plaintiff's evidence and on defendants' motion, the court instructed the jury to find Wolfner not guilty, and the suit proceeded against the remaining defendants.

Plaintiff's declaration consisted of an original and an additional count. In the original count, after reciting that the plaintiff was a person of good repute and deservedly enjoyed the confidence and good opinion of divers persons, etc., it is charged that defendants, contriving and intending to injure plaintiff, etc., appeared before the Grand Jury of Cook County on April 24, 1923, and "falsely, maliciously, and without any reasonable or probable cause whatever, by their testimony under oath, caused and procured the indictment of plaintiff for forgery," and afterwards, wrongfully and unjustly and without any reasonable cause whatever, caused him to be arrested and brought before one

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by this writ of error. It is sought to reverse a judgment for costs against plaintiff, entered November 21, 1903, after a verdict finding defendant in error not guilty, in an action for damages for malicious prosecution. Nathan Horsey was the attorney for plaintiff, and Nathan Wolfson was the manager of the Insurance Sign Co., and Nathan Wolfson was the attorney. The suit, as originally commenced on May 19, 1903, was against the sign co., Horsey and Wolfson, but during the trial at the close of plaintiff's evidence and on defendant's motion, the court instructed the jury to find Wolfson not guilty, and the suit proceeded against the remaining defendant. Plaintiff's declaration consisted of an original and an additional count. In the original count, after reciting that the plaintiff was a person of good repute and deservedly enjoyed the confidence and good opinion of diverse persons, etc., it is charged that defendant, convicted and imprisoned for forgery, appeared before the grand jury of Cook County on April 24, 1903, and maliciously, and without any reasonable or probable cause whatever, by their testimony under oath, caused and procured the indictment of plaintiff for forgery, to be returned, maliciously and without any reasonable cause whatever, caused him to be arrested and brought before one

of the judges of the Criminal Court of Cook County, when he was released on bail; that afterwards, on May 19, 1923, defendants, by virtue of the indictment, wrongfully and unjustly and without any reasonable cause whatever, forced and obliged plaintiff to be placed on trial, before said judge and a jury for the supposed offense; and that after a full hearing plaintiff was found not guilty, was acquitted and discharged from custody, and the prosecution became wholly ended; to plaintiff's damage, etc. In the additional count there are allegations substantially to the same effect.

To both counts the Sign Co. after its demurrer thereto had been overruled, filed a plea of the general issue, and defendants, Herzog and Wolfner, jointly filed a similar plea and a special plea. In the special plea it is alleged that on September 11, 1922, a certain bank check of that date was put in a letter and mailed from Duluth, Minnesota, to the Sign Co., by its correct name or similar name, at Chicago; that it was for \$100, payable to the order of the Sign Co., signed by the Duluth Automobile Exchange, and drawn on the City National Bank of Duluth; that the letter containing the check failed to come into the possession of the Sign Co.; that about six months later, on March 30, 1923, plaintiff notified the Sign Co. that he had possession of the check, claimed it as his property and demanded that the Sign Co. pay to him the amount thereof; that thereupon representatives of the Sign Co. inspected the check, then in possession of plaintiff's attorney, and discovered that the name of the Sign Co. in plaintiff's handwriting, was endorsed thereon, as was also the name of "H. Herzog;" that said representatives then were informed that the check had been deposited in bank about March 3,

the additional count there are allegations substantially to the
prosecution became wholly ended; he plaintiff's counsel, etc. in
guilty, was admitted and discharged from custody, and the
attorney; and that after a full hearing plaintiff was found not
to be placed on trial, before said judge and a jury for the supposed
any reasonable cause whatever, to seek and obliged plaintiff to
by virtue of the indictment, wrongfully and unjustly and without
released on bail; that afterwards, on May 19, 1933, defendant,
of the Judge of the Criminal Court of Cook County, when he was
made effect.

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1923, at plaintiff's request and for the purpose of collecting the amount thereof, but that payment had been stopped by order of the drawer on the drawee bank; that the name "N. Herzog" is not the signature of Nathan Herzog, but is written in imitation of his true signature, and that Herzog never endorsed his name on the check or consented that any other person might do so for him; that the Sign Co. never endorsed the check or authorized any of its agents or any person to do so for it, and that it had no knowledge of the existence of the check until March 30, 1923; that shortly thereafter representatives of the Sign Co. in good faith reported the said facts to an Assistant State's Attorney of Cook County; that on April 7, 1923, upon his request, plaintiff appeared in one of the offices of the State's Attorney in Chicago, produced the check, and voluntarily made a statement respecting his alleged claim of ownership thereof, his endorsement thereon in the name of the Sign Co., and his other acts and doings; that thereafter, on April 13, 1923, the State's Attorney of Cook County, acting solely upon his own motion and without the connivance or suggestion of defendants or any of them, decided that there was reasonable and probable cause to believe that plaintiff had committed the crime of forgery as regards said check, and that he would report the facts to the grand jury, then sitting, which he did; and that thereafter said Herzog and Wolfner, in response to subpoenas served, appeared before the grand jury and gave testimony, and subsequently a true bill of indictment for forgery was returned against plaintiff, and he was arrested and put upon trial on May 19, 1923, before one of the judges of the Criminal Court of Cook County and a jury.

The main contention of counsel for plaintiff in error is that the verdict and judgment are against the weight of the evidence. On the trial plaintiff was a witness in his own behalf

and William F. Adier (one of the attorneys who defended plaintiff on the trial of the criminal case which resulted in plaintiff's acquittal) testified for him. Other witnesses testified to his good reputation, etc. On defendant's behalf Nathan Herzog and Robert M. Walker, a handwriting expert, testified. Frank Peska, an assistant state's attorney, also testified for them as to what occurred in an office of the state's attorney on April 7, 1923, when and where he, plaintiff, Adier, Herzog, Kofner, and a shorthand reporter employed by the state's attorney, were present. We deem it unnecessary to detail the testimony, some of which is conflicting. Suffice it to say that after considering the entire evidence, we are of the opinion that counsel's contention is without merit, particularly on the essential issue whether the defendants, when they acquainted the state's attorney with the facts and afterwards took part in the criminal proceedings instituted by him, had reasonable cause to believe that plaintiff was guilty of the crime of forgery in connection with said check. We think that the evidence sufficiently shows that the defendants had reasonable and probable cause for acting as they did. In Glenn v. Lawrence, 280 Ill. 581, 587, it is said: "If malice and want of probable cause do not concur the action cannot be maintained, and it was for the plaintiff to show that there was not probable cause nor reasonable ground for the prosecution." (See also Israel v. Brooks, 23 Ill. 575, 577; Harpham v. Whitney, 77 Ill. 32, 38.)

And we do not think that the trial court committed any error in instructing the jury at the close of plaintiff's evidence to find the defendant, Wolfner, not guilty.

Counsel further contends that the trial court erred in permitting defendants' witness, Frank Peska, the assistant

and William E. Aber (one of the witnesses who defended plaintiff
on the trial of the criminal case which resulted in plaintiff's
accusation) testified for him. Other witnesses testified to his
good reputation, etc. On defendant's behalf William Harvey and
Robert E. Walker, a handwriting expert, testified. Frank Foster,
an assistant state's attorney, also testified for them as to
what occurred in an office of the state's attorney on April 7,
1922, when and where he, plaintiff, Aber, Harvey, Foster, and a
third person reported employed by the state's attorney, were present.
It seems it was necessary to detail the testimony, some of which is
conflicting. It is to say that after considering the entire
evidence, we are of the opinion that counsel's contention is
without merit, particularly on the material issue whether the
defendant, when they met in the state's attorney with the
plaintiff and afterwards took part in the criminal proceedings instigated
by him, had reasonable cause to believe that plaintiff was guilty
of the crime of forgery in connection with said check. We think
that the evidence sufficiently shows that the defendant had
reasonable and probable cause for acting as they did. In King v.
Lauritzen, 220 Ill. 387, it is said: "It matters not what of
probable cause do not concern the action cannot be maintained, and
it is not the province of the jury to determine whether or not
there was probable cause for the defendant's action." The same
principle is applied in People v. Smith, 77 Ill.
40, 41.
And we do not think that the trial court committed any
error in instructing the jury as to the effect of plaintiff's evidence
to find the defendant, without, not guilty.
We would further mention that the trial court erred
in permitting testimony of Foster, Frank Foster, the assistant

state's attorney, to refresh his memory as to what took place at the conference of April 7, 1923, from a transcript of a stenographer's notes. It appears that at this conference a stenographer, employed by the state's attorney, took down in shorthand notes what was said at the time, and afterwards made a transcript thereof; that afterwards Peska made corrections on this transcript from certain notes he himself had made at the time; that he referred to this transcript as so corrected while giving his testimony solely for the purpose of refreshing his recollection, and testified as to what occurred at the conference from his own recollection; and that the stenographer who wrote out the transcript was not available as a witness at the time of the trial. Under the circumstances we do not think any error was committed. In Mcovill Mfg. Co. v. Cassidy, 275 Ill. 462, 472, it is said: "A witness can testify only to such facts as are within his knowledge and recollection, but he is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book, and it is not necessary that the writing should have been made by the witness himself, or that it should have been an original writing, provided that after inspecting the record he can speak to the facts from his own recollection. Neither is it necessary that the writing thus used should itself be admissible in evidence." (See, also, 1 Greenleaf on Evidence, 15th Ed., Sec. 436; Salbridge v. Lake, etc. ass'n., 98 Ill. App. 96, 99; Brauer v. Laughlin, 211 Id. 534, 542.)

And we do not think that the court committed reversible error, as urged, in the giving of instruction No. 4 offered by defendants.

The judgment of the Superior Court of Cook County should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

G. W. BRAINARD, as trustee
in bankruptcy of the Globe
Auto Supply Corporation,
Appellee,

v.

MORRIS BROEHLICH and
LOUIS MANSBACH,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRADLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in contract, commenced September 17, 1926, plaintiff, as Trustee in bankruptcy of the Globe Auto Supply Corporation, sought to recover of defendants the sum of \$3385.35. To the statement of claim defendants filed an amended affidavit of merits in which they made various admissions, denials and allegations. The bill of exceptions discloses that on July 14, 1927, the cause came on to be heard upon plaintiff's motion to strike said affidavit from the files and enter a judgment for plaintiff "for a portion of his claim," and that after a hearing the court ordered that four paragraphs of the affidavit, numbered 7, 11, 15 and 16, be stricken, and that judgment be entered against defendants for \$2281. In the judgment order, entered on the same day and contained in the present transcript, the court recites that inasmuch as it appears that plaintiff has filed an affidavit of claim, and defendants an affidavit of defense "admitting that there is due to plaintiff from defendants the sum of \$2281," and that said affidavit of defense "is to only a portion of plaintiff's demand" plaintiff should recover his said admitted damages; and the court, after assessing plaintiff's damages at \$2281, enters judgment against defendants therefor, and "reserves for

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

IN THE
COURT OF APPEALS
OF THE STATE OF ILLINOIS

ROBERT ROSENTHAL and
JOHN ROSENTHAL
Appellants.

THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF ILLINOIS

In a first class action in circuit court, commenced September 17, 1935, plaintiff, as trustee in bankruptcy of the above named supply corporation, sought to recover of defendant the sum of \$2500.00. To the statement of claim defendant filed an answer denying all liability of matter in which they made various admissions, denials and allegations. The bill of exceptions discloses that on July 14, 1937, the same came on to be heard upon plaintiff's motion for summary judgment and that judgment was entered against plaintiff for a portion of his claim, and that after a hearing the court ordered that four paragraphs of the affidavit numbered 7, 11, 12 and 13 be stricken and that judgment be entered against defendant for \$2500. In the judgment order, entered on the same day and contained in the present transcript, the court recites that inasmuch as it appears that plaintiff has filed an affidavit of claim, and defendant an affidavit of defense "which are in issue" it is due to plaintiff from defendant the sum of \$2500.00, and that said affidavit of defense "is in only a partial answer to plaintiff's claim." Plaintiff should recover his said alleged damages; and the court, after assessing plaintiff's damages at \$2500.00, entered judgment against defendant for the same.

future determination and adjudication the matter of the balance of plaintiff's demand." From this judgment defendants appealed.

In the statement of claim plaintiff alleges that he was duly appointed Trustee, by the District Court of the United States for the Northern District of California, in the estate of the Globe Auto Supply Corporation (hereinafter called the Globe Co.), which was duly adjudged a bankrupt; that on June 16, 1924, defendants, as copartners under the name of Fidelity Motor Supply Co., leased to the Globe Co. the premises known as 1210-12 South Michigan avenue, Chicago, (copy of lease and rider attached to the statement and made a part thereof); that, at the time of the making of the lease, the Globe Co. delivered to defendants its six (6) judgment notes, each for \$550, - the first note maturing on or before October 15, 1924, and the remaining five notes on or before the 15th day of each succeeding month; that the first three notes, totaling \$1650, were paid to defendants by the Globe Co., and that defendants obtained a judgment against the Globe Co. for the remaining three notes for \$1735.35, which judgment "plaintiff by his agents caused to be paid to defendants under protest on August 11, 1925;" that an involuntary petition in bankruptcy was filed against the Globe Co. on July 13, 1925, and it was adjudicated a bankrupt on September 23, 1925; that the monthly rent under the lease was paid for the months of July and August, 1925, and that on August 8, 1925, the assets of the Globe Co. were sold to one Sam Weisman; that the "said deposit" on the lease "was to apply in payment of the last six months rental that would fall due under said lease;" that about August 9, 1925, plaintiff, as Trustee and by his agents, "presented to defendants a prospective tenant, who was then and there willing and able to take over said premises for the unexpired portion of said lease under the same terms and conditions as therein stipulated," but that defendants refused to

Future determination and adjustment the matter of the balance
of Plaintiff's demand. From this judgment defendant appealed.
In the statement of claim Plaintiff alleges that he
was duly appointed Trustee, by the District Court of the United
States for the Northern District of California, in the estate
of the Globe and Supply Corporation (hereinafter called the
Globe Co.), which was duly adjudged a bankrupt on June 10,
1904, defendant, as co-defendant under the name of Nitchley Motor
Supply Co., issued to the Globe Co. the promissory notes as 1910-
12 Serial Michigan Avenue, Chicago. (copy of issue and rider
attached to the statement and made a part thereof); that, at the
time of the making of the issue, the Globe Co. delivered to defendant
note (a) Judgment notes, each for \$500, - the first note
maturing on or before October 15, 1904, and the remaining five notes
on or before the 15th day of each succeeding month; that the first
three notes, totaling \$1500, were paid to defendant by the Globe
Co. and that defendant retained the same; that the remaining two notes
for the remaining three notes for \$1500.00, which judgment Plaintiff
by his agents agreed to be paid to defendant under protest on
August 15, 1905; that on involuntary petition in bankruptcy was
filed against the Globe Co. on July 15, 1905, and it was adjudged
a bankrupt on September 25, 1905; that the monthly rent under the
lease was paid for the months of July and August, 1905, and that
on August 5, 1905, the assets of the Globe Co. were sold to one
Sam Weisman; that the "paid deposit" on the lease was to apply
in payment of the last six months rental that would fall due under
said lease; that about August 5, 1905, Plaintiff, as Trustee and
by his agents, "proceeded to defendant's prospective tenant, who
was then and there willing and able to pay over said premises for
the monthly portion of said lease under the same terms and
conditions as therein stipulated," but that defendant refused to

accept the proposed tenant "in mitigation of plaintiff's damages, and did then and there attempt to forfeit the said leasehold interest;" and that "thereafter, however, defendants did enter into a binding lease with said proposed tenant at a rental, as plaintiff is informed and believes, considerably more than that stipulated" in the original lease.

In plaintiff's affidavit of claim it is stated that there is due to him from defendants, after allowing all just credits, etc., the sum of \$3,585.35, together with interest at the rate of 5 per cent. The sum claimed is the aggregate of said first three notes, \$1650, (alleged in the statement of claim to have been paid to defendants by the Globe Co.) and said judgment on said last three notes, \$1735.35 (alleged to have been paid to defendants by plaintiff under protest.)

The said lease, copy of which is attached to plaintiff's statement of claim, contains the usual covenants and provisions. It is dated June 16, 1924, and is signed by defendants as lessors and by the Globe Co. as lessee, and it demises the premises to the Globe Co. for the period from June 1, 1924, to April 29, 1927, at a monthly rental of \$550, payable on the first day of each and every month in advance. The rider to the lease, dated the same day and made a part thereof, is a written agreement, signed by defendants, as parties of the first part, and by the Globe Co., as party of the second part. It has eight paragraphs. In the first paragraph it is stated that said lease "is subject to the terms, conditions and provisions of a lease, dated August 12, 1921," between John Borden, lessor, and Froehlich and Mansbach (defendants) lessees, "covering the herein described building, for the term from May 1, 1922, until April 30, 1927." In the seventh paragraph it is stated that the Globe Co., at the time of the execution of

through the proposed terms "in violation of plaintiff's business" and did then and there attempt to forfeit the said leasehold interest; and that "thereafter, however, defendant did enter into a binding lease with said proposed terms at a rental as plaintiff is informed and believes, considerably more than that stipulated" in the original lease.

In plaintiff's affidavit of claim it is stated that there is due to him from defendant, after allowing all just credits, etc., the sum of \$3,388.35, together with interest at the rate of 8 per cent. The sum claimed in the affidavit of claim is: first three notes, \$1800, (alleged in the statement of claim to have been paid to defendant by the State Co.) and said interest on said last three notes, \$1588.35 (alleged to have been paid to defendant by plaintiff under protest.)

The said lease, copy of which is attached to plaintiff's affidavit of claim, contains the usual covenants and provisions. It is dated June 16, 1904, and is signed by defendant as lessor and by the State Co. as lessee, and is binding on the parties to the lease for the period from June 1, 1904, to April 30, 1907, at a monthly rental of \$300, payable on the first day of each and every month in advance. The lease to the lease, dated the same day and made a part thereof, is a written agreement, signed by defendant, as parties of the first part, and by the State Co. as party of the second part. It has eight paragraphs. In the first paragraph it is stated that said lease "is subject to the terms, conditions and provisions of a lease, dated August 14, 1901, between John Gustaf, lessor, and Troschick and Hansford (defendants herein), covering the parcel described and being, for the term from May 1, 1902, until April 30, 1907." In the seventh paragraph it is stated that the State Co., at the time of the execution of

the lease to it, has delivered to Froehlich and Mansbach (defendants) the six judgment notes (mentioned in said statement of claim.) And, after stating now payments on said notes shall be made, and that, if any one be not paid when due, said lessors (defendants) shall have the right to declare all the remaining notes due and payable, it is further stated in said seventh paragraph:

"The total amount of \$3,300 to be paid to the parties of the first part (defendants) in payment of said notes shall be held and retained by said parties of the first part as a deposit and as security to them for the payment of rental under this lease, and to be applied by them in payment of the last six months rental that shall fall due under this lease; and parties of the first part shall allow party of the second part (Globe Co.) 6 per cent annual interest upon said deposit and the installments thereof from the time of receipt, to be applied against the rent falling due thereafter and hereunder; and in case of default by party of the second part in payment of any rent due hereunder, and if such default shall continue for 10 days after written notice thereof shall be given by parties of the first part to party of the second part by telegram or registered letter to its main California office, then said sum of \$3,300 shall be forfeited to the parties of the first part as their liquidated damages by reason of such default."

In defendants' said affidavit of merits they only admitted the execution of their lease to the Globe Co., and that the "deposit" on the lease, mentioned in the statement of claim, was agreed upon. While they did not admit, as alleged in the statement of claim, that the first three notes were paid by the Globe Co., or that the judgment obtained on the last three notes was paid by plaintiff, as trustee, under protest, they alleged that said "deposit" was to be "for liquidated damages in case the Globe Co. should default in any of the terms of the lease or should terminate the same before its expiration."

And in said affidavit defendants denied that on August 8, 1925, or at any other time, plaintiff presented a prospective tenant, who was ready, able and willing to take over the premises; and denied that plaintiff, as Trustee, had any authority to prosecute the present suit.

the issue is it, has delivered to the plaintiff and defendant (defendants) the six judgment notes (mentioned in said statement of claim). And, after deducting now payments on said notes shall be made, and that, if any one be not paid when due, said interest (defendants) shall have the right to deduct all the remaining notes due and payable, it is further stated in said seventh paragraph:

"The total amount of \$3,100 to be paid to the parties of the first part (defendants) in payment of said notes shall be held and retained by said parties of the first part as a deposit and be security for them for the payment of rental under this lease, and to be applied by them in payment of the last six months' rental that shall fall due under this lease, and parties of the first part shall allow party of the second part (plaintiff) a per cent annual interest upon said deposit and the installment interest from the time of receipt, so be applied against the rent falling due thereafter and hereunder; and in case of default by party of the second part in payment of any rent due hereunder, and if such default shall continue for 10 days after written notice thereof shall be given by parties of the first part to party of the second part by registered or registered letter to the main residence of office, then said sum of \$3,100 shall be forfeited to the parties of the first part as their liquidated damages by reason of such default."

It is further stated that at receipt of notice they only admitted the execution of said lease to the Globe Co., and that the "deposit" on the lease, mentioned in the statement of claim, was agreed upon. This they did not admit, as alleged in the statement of claim, that the first three notes were paid by the Globe Co., or that the judgment obtained on the last three notes was paid by plaintiff, as stated, under protest. They alleged that said "deposit" was to be for liquidated damages in case the Globe Co. should default in any of the terms of the lease or should terminate the same before its expiration.

And in said affidavit defendant denied that it agreed to, 1932, or at any other time, plaintiff presented a prospective tenant, who was ready, able and willing to take over the premises, and that plaintiff, as trustee, had any authority to

And in said affidavit defendants alleged that the rent of the premises for the month of September, 1925, (amounting to \$550) was not paid; alleged that thereafter they had to re-rent the premises, at a loss of \$50 per month for certain months, up to the time the lease expired (April, 1927), being a total loss of \$400; alleged that in re-renting the premises they were compelled to pay real estate commissions, amounting to \$200; and alleged that they also were required to pay for operation of elevator and for heating the sum of \$292.

And in said affidavit are contained the following additional paragraphs, which were stricken by the court:

"(7) Defendants further allege that they had become indebted for labor, services, material, and otherwise in re-decorating, re-fixing and otherwise changing said premises, so that the same could be re-let, in the sum of \$1000.

(11) Defendants further allege that part of said money, mentioned in plaintiff's statement of claim, in the sum of \$1100, was deposited with them by parties other than said bankrupt, and that said money so deposited is not the property of said bankrupt.

(15) Defendants deny the right of plaintiff to recover in this suit, for the reason that the account sued on was not an asset of the bankrupt at the time it was adjudicated a bankrupt.

(16) That plaintiff brought suit prematurely in that said lease had not expired at the time the suit was brought."

After reviewing plaintiff's statement of claim, and defendants' affidavit of merits, including those paragraphs stricken by the court, we are of the opinion that there was no justification or warrant for the court's findings (as stated in the judgment order) that defendants had "admitted that there is due to plaintiff from defendants the sum of \$2281," and that defendants' said affidavit was "only to a portion of plaintiff's demand," and that plaintiff is entitled to recover his "admitted damages." We think that defendants' affidavit of merits, including

and he said affirmatively that the sum of \$1000 was not paid after the month of September, 1937, (amounting to \$250) and he said affirmatively that thereafter they had no more to pay. At a loss of \$100 per month for certain months, at the time the issue expired (April, 1937), being a total loss of \$400; alleged that in re-paying the premiums they were compelled to pay each certain commission, amounting to \$200; and alleged that they also were required to pay for operation of elevator and for heating the sum of \$200.

and in said affidavit are contained the following additional paragraphs, which were stricken by the court:

"(7) Defendant further alleges that they had become indebted for labor, services, material, and otherwise in re-heating, re-lighting and otherwise changing said premises, so that the same could be re-let, in the sum of \$1000.

(11) Defendant further alleges that part of said money, mentioned in Plaintiff's statement of claim, in the sum of \$110, was deposited with them by parties other than said bank, and that said money so deposited is not the property of said bank.

(12) Defendant deny the right of Plaintiff to recover in said suit, for the reason that the amount used on was not in name of the bank, and at the time it was advanced a bank.

(13) That Plaintiff brought this suit prematurely in that said lease had not expired at the time the suit was brought."

After reviewing Plaintiff's statement of claim, and

defendant's affidavit of merits, including those pages of the court, we are of the opinion that there was no justification or warrant for the court's findings (as stated in the judgment order) that defendant had "admitted that there is due to plaintiff from defendant the sum of \$2000," and that defendant's said affidavit was "only to a portion of plaintiff's demand," and that plaintiff is entitled to recover his "admitted damages." We think that defendant's affidavit of merits, including

those paragraphs stricken by the court, presented defense, prima facie, to the whole of plaintiff's claim or demand, and that the judgment appealed from must be reversed and the cause be remanded for a trial upon the merits, and upon the various issues raised, including those as set forth in the stricken paragraphs of defendants' said affidavit. As regards the issue as to the premature beginning of the suit, it was not necessary that such issue be raised by a plea in abatement, but, if plaintiff's demand had not matured at the time of the institution of the suit, the defendants could avail themselves of the objection on the trial under a plea of the general issue or general denial. (1 R. C. L. p. 340, sec. 21; Collins v. Monteny, 3 Ill. App. 182, 184; Kahn v. Cook, 22 Ill. App. 559, 561; Bacon v. Schafflin, 185 Ill. 122, 125.)

The judgment of the Municipal Court is reversed and the cause is remanded for a trial upon the merits.

REVERSED AND REMANDED.

Barnes, P. J., and Buchanan, J., concur.

[illegible]

* Includes 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676,

SAMUEL HAMINS, doing business as
Wetzel County Cigar Works,
Plaintiff and appellee.

v.

KILDOW BROTHERS CIGAR COMPANY,
an Ohio corporation,
Defendant,

EARL H. TENNYSON, Interpleader,
Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On April 23, 1926, plaintiff, a dealer in tobacco at Nortonville, West Virginia, commenced an attachment suit against defendant, Kildow Brothers Cigar Company, an Ohio corporation, dealing in tobacco and cigars and having its principal office at Bethesda, Ohio. Plaintiff claimed that defendant was indebted to him upon certain trade acceptances, past due, in the aggregate sum of \$1186. Under plaintiff's direction and by virtue of the writ, the sheriff on the same day levied upon 17 cases of cigars, identified by certain case numbers and claimed by plaintiff to be the property of defendant. Tennyson at the time was engaged in business in Chicago, under the name and as sole owner of the Rapid Sales Co., in buying and selling cigars in large quantities, and the cigars levied upon were found in his possession at his place of business in Chicago. On April 29th, he gave a forthcoming bond to the sheriff and the cigars attached were released to him. Although duly notified as required by law of the pendency of the suit, the defendant did not appear and subsequently was defaulted. On May 14, 1926, Tennyson entered his appearance by attorneys and

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

On May 14, 1958, Thompson entered his appearance by attorney and with the following (1) the above and (2) the following:

Thompson duly executed a petition in law of the guardianship of the person of the child and the papers attached were released to him. Plans of business in Chicago. On April 22nd, he gave a "voluntary" and the papers attached upon were taken in the possession of his

filed his verified interplea, under section 29 of the Attachments Act, alleging that the cases of cigars seized under the writ were and are his property and not the property of defendant. To this plea plaintiff filed an amended replication, alleging in substance (1) that the property seized was defendant's and not Tennyson's, and (2) that any purported transfer of the cigars from defendant to Tennyson prior to the date of the levy "is fraudulent and void" as against defendant's creditors and plaintiffs, in that "any such purported transfer * * has been had in violation of a so-called Bulk Sales Law in force and effect in the State of Ohio, and a so-called Bulk Sales' Law in force and effect in the State of Illinois (in either of which states said purported transfer shall have been consummated)," and in that Tennyson, "willfully, knowingly and fraudulently and with intent and design to defraud the creditors" of defendant, "did for an inadequate and insufficient consideration obtain possession" of the property from defendant.

On June 28, 1927, there was a trial before a jury. Plaintiff introduced evidence showing that defendant was indebted to him in the sum of \$1180 and that defendant was a non-resident corporation. This evidence was not disputed. Tennyson, upon whom the burden rested of proving that he was the owner of the property attached (Hollenback v. Todd, 119 Ill. 543), testified in his own behalf, as did three witnesses for him, and his testimony, together with certain invoices, freight bills, bills of lading and other writings in evidence, tended to show that he had purchased the cigars in question of defendant and, before the levy of the attachment, had paid for them at the prices charged by defendant. Certain drafts drawn upon him and marked paid, and certain paid checks of the Master Cigar Co., of which Tennyson was president, were offered in evidence by him and, erroneously as we think, refused admission by the court. No evidence was offered by plaintiff showing that

filed his verified petition, under section 33 of the Wisconsin
 Statutes, alleging that the cause of action accrued under the will of
 and was his property and not the property of defendant. To this
 plaintiff filed an amended petition, alleging in substance
 (1) that the property passed from defendant's estate and not
 and (2) that any purported transfer of the property from defendant
 to defendant prior to the date of the will "is fraudulent and void"
 as against defendant's creditors and plaintiff, in that "any such
 purported transfer" "has been had in violation of a so-called
 valid sales law in force and effect in the State of Ohio, and a
 so-called valid sales law in force and effect in the State of
 Illinois (in either of which states said purported transfer would
 have been commenced)", and in that defendant, "intentionally
 and fraudulently and with intent and design to defraud the creditors
 of defendant," did for an inadequate and manifestly less consideration
 obtain possession of the property from defendant.
 On June 28, 1927, there was a trial before a jury.
 Plaintiff introduced evidence showing that defendant was indebted
 to him in the sum of \$1000 and that defendant was a non-resident
 of Wisconsin. This evidence was not disputed. Defendant, upon whom
 the burden rested of proving that he was the owner of the property
 (see *Windsor v. Telford*, 111 Ill. 643), testified in his own
 behalf, as did three witnesses for him, and his testimony, together
 with certain invoices, freight bills, bills of lading and other
 writings in evidence, tended to show that he had purchased the goods
 in question of defendant and, before the levy of the attachment,
 had paid for them at the prices charged by defendant. Certain
 checks given upon him and notes paid, and certain paid checks of
 the Western City Co., of which I myself was president, were offered
 in evidence by him and, obviously as we think, refused admission
 by the court. No evidence was offered by plaintiff showing that

the sale or transfer of the cigars to Tennyson was fraudulent or in violation of the Bulk Sales Law of either the states of Ohio or Illinois. The court, over Tennyson's objections, instructed the jury to find for the plaintiff and against the defendant on the attachment issue and to assess plaintiff's damages at \$1180, and also to find for the plaintiff and against Tennyson on the issue as to his interplea. The jury returned such a verdict and the court, after overruling Tennyson's motion for a new trial, entered judgment upon the verdict and Tennyson prayed and perfected the present appeal.

After reviewing the evidence we are satisfied that the trial court committed error in instructing the jury as stated and in entering the judgment appealed from. Much of Tennyson's offered evidence as was allowed admittance tended strongly to show that the cigars were, at the time of the levy of the attachment, his property and not that of defendant, and the court should have submitted the issue, as framed by Tennyson's interplea and plaintiff's replication thereto, to the jury under proper instructions.

As there must be another trial of the cause we refrain from discussing more in detail the evidence. For the reasons indicated the judgment of the circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes P. J., and Scanlan, J., concur.

the sale or transfer of the rights to Thompson was prohibited by
in violation of the Bank Act and either the state of Ohio
or Illinois. The court, over Thompson's objection, instructed
the jury to find for the plaintiff and against the defendant on
the assignment issue and to assess plaintiff's damages at \$100,000.
and also to find for the plaintiff and against Thompson on the
issue as to his intention. The jury returned such a verdict and
the court, after overruling Thompson's motion for a new trial,
entered judgment upon the verdict and Thompson moved and persisted
the present appeal.

After reviewing the evidence we are satisfied that the
trial court committed error in instructing the jury as stated and
in entering the judgment appealed from. Much of Thompson's offered
evidence was allowed admission without strongly to show that the
evidence was, at the time of the assignment, his property
and not that of defendant, and the court should have excluded the
evidence, as framed by Thompson's intention and plaintiff's negligence
therein, so the jury could properly instruct.
As there was no material trial of the issues we refrain
from discussing same in detail the evidence. For the reasons
indicated the judgment of the circuit court is reversed and the
cause is remanded.

REVEREND AND HONORABLE.

MARNO PABLYEVICH,
Appellee,

v.

M. W. GILLOGLY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of the 4th class, commenced December 15, 1926, there was a finding and judgment for \$100, against defendant and he appealed. Plaintiff has not filed a brief in this appellate court.

Plaintiff claimed damages in the sum of \$200. In his amended statement of claim he alleged in substance that defendant, a tenant of the first floor of plaintiff's apartment building at No. 1518 East 83th street, Chicago, under written lease expiring September 30, 1926, failed to surrender the possession of the premises to plaintiff at the end of the term; that as a result a third person, whom plaintiff had procured as a tenant of the premises to take possession commencing October 1, 1926, refused to take possession and thereby plaintiff lost him as a tenant; and that plaintiff was unable to procure a new tenant until December 1, 1926, - a period of two months.

Upon the trial plaintiff introduced the lease under which defendant had been occupying the premises. It is in the common form, partly printed and partly in typewriting, dated April 7, 1926, and thereby plaintiff leased the premises, solely as a private dwelling, from May 1, 1926, to September 30, 1926, for a total rental of \$500, payable in monthly installments of \$100, each in advance, on the first day of each and every

MAILED TWENTY-THREE

APPEALS

APPEAL FROM JUDICIAL

COURT OF CHICAGO

U. S. DISTRICT COURT

CHICAGO, ILL.

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

In an action of the 4th class, commenced December 15, 1926, there was a finding and judgment for \$100, against defendant and no appeal. Plaintiff has not filed a writ in this appellate court.

Plaintiff claimed damages in the sum of \$200. In his amended statement of claim he alleged in substance that defendant, a tenant of the first floor of plaintiff's apartment building at No. 1212 West 26th Street, Chicago, under written lease expiring September 30, 1926, failed to surrender the possession of the premises to plaintiff at the end of the term and as a result a third person, whom plaintiff had procured as a tenant of the premises to take possession commencing October 1, 1926, was turned to take possession and thereby plaintiff lost him as a tenant and that plaintiff was unable to procure a new tenant until December 1, 1926, - a period of two months.

Upon the trial plaintiff introduced the lease under which defendant had been occupying the premises. It is in the common form, partly printed and partly in typewriting, dated April 7, 1926, and whereby plaintiff leased the premises, solely as a private dwelling, from May 1, 1926, to September 30, 1926, for a total rental of \$200, payable in monthly installments of \$100, each in advance, on the first day of each and every

month of the term. Andre Spolerich, plaintiff's agent for the renting of the building, and one Wiselneck, janitor of the building, testified for plaintiff, and defendant was a witness in his own behalf.

It appears from the evidence that about July 30, 1936, defendant notified plaintiff in writing that he would vacate the premises at the expiration of the term of the lease; that Spolerich, desiring to retain defendant as plaintiff's tenant for an additional term, thereafter had negotiations with him and urged him to remain under a new lease and at the same monthly rental, but that defendant said that, if he remained, he only would pay rent at the rate of \$90 per month; that these negotiations were resumed at the premises on September 30th, (the last day of the term), and finally, upon defendant refusing to pay as rent under any new lease more than \$90 per month, Spolerich told defendant to "move out;" and that defendant vacated the premises on the morning of October 2nd.

In our opinion the finding and judgment cannot be sustained for the reason that plaintiff's evidence did not disclose that he had suffered any damages, as charged, by reason of defendant's failure to move out of the premises on September 30th. Although Spolerich on his direct examination stated that he "had the apartment rented to a party who was to move in on October 1st," and that said party, because defendant still was in possession on that day, "had to store his furniture and then would not take the apartment," it appeared from his cross-examination that he did not know the name of said party, or where he lived, and that plaintiff had not lost any tenant because of defendant's failure to vacate the premises prior to October 1st. Furthermore, the negotiations, had between Spolerich and defendant at the premises on September

month of the term. When expiration, Plaintiff's agent for the
renting of the building, and one Christian, Janitor of the
building, sent the Plaintiff, and defendant was a witness
in his own behalf.
It appears from the evidence that about July 20, 1924,
defendant notified Plaintiff in writing that he would vacate the
premises at the expiration of the term of the lease, that
Plaintiff, desiring to retain defendant as Plaintiff's tenant for
an additional term, thereafter had negotiations with him and urged
him to remain under a new lease and at the same monthly rental.
But that defendant said that, if he remained, he only would pay
rent at the rate of \$20 per month; that these negotiations were
resumed at the premises on September 20th, (the last day of the
term), and finally, upon defendant refusing to pay as rent under
any new lease more than \$20 per month, Plaintiff told him that
he "move out", and that defendant vacated the premises on the
morning of October 1st.
It was during the time that defendant's evidence did not disclose
that he had received any damages, as alleged, by reason of defendant's
failure to move out of the premises on September 20th.
Although Plaintiff on his direct examination stated that he "had
the apartment rented to a party who was to move in on October 1st,"
and that said party, because defendant did not move in possession on
that day, "had to move his furniture and then would not take the
apartment," it appears from his cross-examination that he did not
know the name of said party, or where he lived, and that Plaintiff
had not lost any amount because of defendant's failure to vacate
the premises prior to October 1st. Furthermore, the negotiations
had between Plaintiff and defendant at the premises on September

30th, indicate that no new tenant had been procured for the premises, who had agreed to move in on the following day. Furthermore, no evidence was introduced by plaintiff showing that any efforts had been made by him or Spelerich in October to rent the premises.

For the reasons indicated the judgment of the Municipal court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

It is believed that no new cases have been reported for the
 present, and that the disease is now in the declining stage.
 However, as the disease is still present in the community, it
 is not yet safe to say that it has been completely
 eradicated.

For the purpose of preventing the spread of the
 disease, it is recommended that the public be
 kept informed of the latest news.

Respectfully,
 J. J. J.

Enclosed, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

MAYME AGNES RYAN, administratrix
of estate of Anna Ryan, deceased,
Appellee,

v.

LENA J. LARSEN,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for negligently causing the death of plaintiff's intestate, on account of injuries received in an automobile accident early in the evening of October 13, 1925, at or near the intersection of North Ashland avenue and Ainslie street (an east and west street), Chicago, there was a trial before a jury in May, 1927, resulting in a verdict in plaintiff's favor for \$5,000. On July 25, 1927, the court, after overruling motions for a new trial and in arrest of judgment, entered judgment upon the verdict against defendant, and she appealed.

Plaintiff's intestate, 56 years of age, while attempting as a pedestrian to cross the avenue on or near the cross-walk on the south side of Ainslie street, was struck by defendant's automobile, moving southerly in the avenue, and received such serious injuries as caused her death on October 20, 1925. She was a widow, and did all the housework for herself and her two unmarried daughters, plaintiff and Gertrude Ryan, living with her at her house. She left her surviving three daughters, a married daughter, Josephine McGady, and a son, George Ryan, all adults.

Plaintiff's declaration consisted of three counts.

The first charged general negligence in operating the automobile

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STATE OF NEW YORK
COUNTY OF NEW YORK

STATE OF NEW YORK
COUNTY OF NEW YORK

THE COURT

In an action for damages for negligently causing the death of plaintiff's husband, an account of injuries received in an automobile accident which occurred on the evening of October 12, 1935, at or near the intersection of North Second Avenue and Alameda Street (an east and west street), Chicago, there was a trial before a jury in May, 1937, resulting in a verdict in plaintiff's favor for \$5,000. On July 22, 1937, the court after overruling motions for a new trial and in arrest of judgment, entered judgment upon the verdict against defendant, and the appeal.

Plaintiff's husband, 35 years of age, while attempting as a pedestrian to cross the avenue on or near the crosswalk on the south side of Alameda Street, was struck by defendant's automobile, moving southerly in the avenue, and received such serious injuries as caused her death on October 26, 1935. She was a widow, and at the time of her death was living with her at her home. She left her surviving three children, a daughter, daughter, Josephine McGee, and a son, George McGee, all residing in Chicago. Plaintiff's contention consisted of three counts. The first charged General negligence in operating the automobile

by agent or servant. The second charged willful and wanton negligence; and the third negligence in driving the automobile at an excessive rate of speed in violation of the statute. To all counts defendant filed a plea of the general issue.

Plaintiff's only eye-witness to the accident was Matthews C. Schaeffer, and he testified at length both on direct and cross-examination. Another witness testified for plaintiff as to what he saw and did immediately following the accident. Defendant, who was riding in the automobile at the time, was a witness in her own behalf, and her niece, Natalie Larson, about 20 years of age and the driver of the automobile, testified for her, as did three other eye-witnesses. A police officer and another person, both of whom arrived upon the scene immediately following the accident, also testified for defendant.

The evidence disclosed the following facts in substance: Plaintiff's intestate lived in an apartment in a building, consisting of stores on the ground floor and apartments above, on the south west corner of North Ashland avenue and Ainslie street. The entrance to the apartment was about 100 feet south of Ainslie street. The width of the avenue from curb to curb, south of Ainslie street, was 38 feet, and the width of Ainslie street from curb to curb was 30 feet. Said intestate had been walking west on the south side of Ainslie street. She was in excellent health and her eyesight and hearing were good. As she reached the east curb of the avenue she looked to the north and to the south and then started to walk west across it on the cross-walk. At this time defendant's automobile, moving south in the avenue in the center or west of the center thereof at a speed variously estimated at from 20 to 35 miles per hour, was a considerable distance north of Ainslie street. When said intestate reached a point about in

by agent or persons. The record showed William and William
negligence; and the third negligence in driving the automobile
at an excessive rate of speed in violation of the statute. To
all certain testimony filed a plea of the general issue.
Plaintiff's only eye-witness to the accident was
Matthew C. Gorman, and he testified as follows: I was on duty
and cross-examination. Another witness testified for Plaintiff
as to what he saw and did immediately following the accident.
Defendant, who was riding in the automobile at the time, was a
woman in her own house, and her name, Marie L. L. L., was
30 years of age and the driver of the automobile, testified for
her, as did three other eye-witnesses. A police officer and
another person, both of whom arrived upon the scene immediately
following the accident, also testified for defendant.
The evidence disclosed the following facts in substance:
Plaintiff's father lived in an apartment in a building, con-
sisting of three on the ground floor and apartments above, on
the south west corner of North Third Street and Alameda Street.
The entrance to the apartment was about 100 feet south of Alameda
Street. The width of the avenue from curb to curb, south of
Alameda Street, was 30 feet, and the width of Alameda Street from
curb to curb was 30 feet. Said defendant had been residing with
on the north side of Alameda Street. He was a well-known person
and had a reputation and history was good. As was known the east
end of the avenue he looked to the north and to the south and
then started to walk west toward it on the crosswalk. At this
time defendant's automobile, moving south in the avenue in the
course of road of the upper block at a speed reasonably estimated
at from 20 to 30 miles per hour, was a considerable distance north
of Alameda Street. When said defendant reached a point about 10

the center of the avenue on the cross-walk, the automobile was about 100 feet away from her, but coming at the same speed towards her, and she quickened her pace into a slow run in a south-westerly direction, towards her home. When the car was a short distance away from her the driver made unsuccessful efforts to avoid a collision, but turned the car so that it moved in a southwesterly direction and struck said interstate south of the cross-walk and east of the west curb of the avenue, carried her for an instant on the right front fender and then threw her down upon the pavement. When the car came to a stop its right front wheel was over the west curb of the avenue and said interstate was lying with her head or face against the curb, south of the car, and about in front of the entrance to her home. There were no other vehicles moving in either direction on the avenue at the time, although an automobile, driven by defendant's witness, Oman, was standing in Ainslie Street, facing east, having stopped to allow defendant's car to pass in front of it, although Oman's automobile had the right of way. Natalie Larson, the driver of defendant's car testified on direct examination that she sounded the horn when the car had reached the middle of Ainslie street, but on cross-examination she admitted that she had testified at the coroner's inquest, shortly after the accident, that she "didn't sound the horn because the woman looked right up at me."

Counsel for defendant contends in substance that the verdict is manifestly against the weight of the evidence both on the questions of the negligence of the driver of defendant's car and deceased's contributory negligence, in that, instead of remaining standing in the middle of the avenue on the cross-walk and allowing the oncoming car to pass to the west and in front of her, she took an "unnecessary chance" in running in a diagonal direction in front of it. We cannot agree with the contention.

the driver of the vehicle on the crosswalk, the automobile was
about 100 feet away from her, and coming at the same speed towards
her, and she estimated her pace into a slow run in a north-westerly
direction, towards her home. When the car was a short distance
away from her the driver made unsuccessful efforts to avoid a
collision, but turned the car so that it moved in a southeasterly
direction and struck with impact the north of the crosswalk and
east of the west curb of the avenue, striking her as she was on
the right hand corner and then threw her down upon the pavement.
When the car came to a stop the right front wheel was over the west
curb of the avenue and said witness was lying with her head on
the curb against the curb, south of the car, and about in front of the
entrance to her home. There were no other vehicles moving in either
direction on the avenue at the time, although an automobile, driven
by defendant's witness, Green, was coming in from the west, having
just passed the car at the time defendant was in front of
it, at least 100 feet or more to the right of way. Witness
the driver of defendant's car testified on direct examination that
she remained the way then the car had passed the middle of the
crosswalk, but on cross-examination
at the witness's house, shortly after the accident, that she
"didn't know the first woman the witness looked right up at me."
on the witness's testimony for the witness's concern in such that she
witness is definitely against the weight of the evidence held on
the question of the negligence of the driver of defendant's car
and defendant's conduct very negligent, in fact, instead of not
maintaining standing in the middle of the avenue in the crosswalk
and allowing the witness to be run to the west and in front of
her, she took an unnecessary chance in running in a diagonal
direction in front of it. We cannot agree with the conclusion.

We think that under all the facts and circumstances in evidence both questions were for the jury to determine, and we are not disposed to interfere with their verdict on either question.

Furthermore, we do not think that the court erred in permitting the question of the willful and wanton conduct of the driver of the car to go to the jury, as counsel also urges. We think there was evidence of such conduct on her part sufficient to warrant the jury in passing upon the question. In Heidenreich v. Bremner, 260 Ill. 439, 446, it is said: "Whether a personal injury has been inflicted by gross or wanton negligence is a question of fact to be determined by the jury. * * It is not always easy to state what degree of negligence the law considers equivalent to wanton or gross negligence. The character of an act as being wanton or gross is greatly dependent upon the circumstances of each case. * * An entire absence of care for the life, person or property of others, if such as exhibits indifference to consequences, makes a case of constructive or legal willfulness, such as charges a person whose duty it was to exercise care with the consequences of a legal injury." (See, also, Children Express Co. v. Krug, 391 Ill. 475, 476; Jensary v. Chicago and Interurban Traction Co., 306 id. 392, 397; Brown v. Illinois Terminal Co., 319 id. 326, 331.) In the Brown case it is said: "Ill-will is not a necessary element to establish the charge. Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal right of the other. A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through

recklessness or carelessness when it could have been discovered by the exercise of ordinary care." In the present case we think that the evidence disclosed a reckless disregard for the safety of plaintiff's intestate on the part of the driver of the car after she had knowledge of the impending danger to the former. As there were no obstructions to her view south in the avenue she, about the time the car was entering the intersection, could or should in the exercise of ordinary care have seen said intestate crossing the avenue and in a position of danger. Yet she did not then check the excessive speed of the car, but came right on, and not until she was very close to said intestate did she make her unsuccessful efforts to stop the car, or change its direction, to avoid the imminent collision.

Counsel also contends that the trial court committed reversible error in allowing a certain statement, made by plaintiff while under cross-examination, to remain in the record. Counsel had ascertained from questions put to the witness that her sister, Gertrude Ryan, was not working when the deceased met with the accident, and that shortly before the trial Gertrude had married. The witness then was asked: "Up to the time of her marriage she (Gertrude) was working, wasn't she?" And the witness replied: "Yes, when she was able. Her health is not very good." Thereupon, counsel objected to any statement about Gertrude's health, but the court overruled the objection, stating "she said she was not working all the time." Counsel argues that the error consisted in allowing proof of the ill-health of Gertrude, one of the deceased's daughters, and cites the case of Chicago, etc. R. Co. v. Poolridge, 174 Ill. 330, where it was decided, in an action similar to the present one, that it was a material error to admit evidence that an

...the evidence disclosed a technical discrepancy for the safety of plain... it's inference on the part of the driver of the car after she had knowledge of the impending danger to the ferry. At that time the car was entering the intersection, could or should in the event of an emergency have been stopped... the excessive speed of the car, but some light on, and not until she was very close to said intersection did she make her unsuccessful efforts to stop the car, or change its direction, to avoid the imminent collision.

Counsel also contends that the trial court committed reversible error in allowing a certain statement made by plaintiff while under cross-examination, to remain in the record. Counsel has submitted two questions out to the witness that her answer, "Yes, I was not working when the deceased met with the accident, and that shortly before the trial deceased had married the witness then was asked: "Up to the time of her marriage and (deceased) was working, wasn't she?" And the witness replied: "Yes, when she was alive. Her health is not very good." Thereupon, counsel objected to any statement about deceased's health, but the court overruled the objection, saying "she said she was not working all the time." Counsel argues that the error consisted in allowing proof of the ill-health of deceased, one of the deceased's daughters, and cites the case of Boyd v. Boyd, 170 Ill. 350, where it was held, in an action similar to the present, that it was a technical error to have witness say...

adult son of deceased was a cripple, etc. It appeared from the opinion in the Poolridge case that said evidence was offered by the plaintiff for its effect upon the jury, and was admitted by the trial court upon the erroneous theory "that, under the law, this crippled son was in need of help on account of his helpless condition, and therefore had been supported, and was legally entitled to be supported, by his father because of such condition." In the present case we do not think that the court committed reversible error as contended. The witness' statement, complained of, was brought out on cross-examination by defendant's attorney, and he did not move that it be stricken from the record. Furthermore, plaintiff on the trial made no attempt to enhance the damages because of Gertrude's ill-health.

Counsel further contends that the trial court erred in the giving of two instructions offered by plaintiff, in the refusing of another instruction offered by defendant, and in the modifying of still another offered by defendant. We have examined these instructions, as well as all given instructions, and do not think, in view of the evidence and all given instructions, that the court committed reversible error in any of the particulars mentioned. The jury were fully and fairly instructed.

Counsel finally contends that the verdict of \$5000 is excessive, and argues that this is so because it appears that the deceased was 56 years of age when she met her death, that her two daughters for whom she kept house both received incomes from their work, that her son was married and self-supporting, and that another daughter was married and lived with her husband elsewhere. We cannot agree with the contention or argument. In Chicago etc. R. Co. v. Stacek, 171 Ill. 9, it is decided that, in an action for the

negligent killing of a woman, who left surviving her adult children and there was evidence tending to prove that they had derived a benefit from her life, the pecuniary value of that benefit must be left to the jury. In McFarlane v. Chicago City R. Co., 233 Ill. 476, 482, where plaintiff's intestate had been a widow, 57 years of age, and had had adult children living with her, it is said: "There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the life. These children might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate. It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with certainty. Clearly, one of the elements of pecuniary loss is the personal service of deceased." In the present case, the deceased's expectancy of life, at 36 years of age, was about 17 years according to the standard mortality tables, of which courts take judicial notice. (Marshall v. Marshall, 352 Ill. 568, 572; Muhlke v. Fiedemann, 280 id. 534, 543.) Then consideration is given to the services, care and attention which the evidence in the present case showed the deceased had bestowed upon the two daughters who had been living with her, also to the pecuniary value of her life as measured by service rendered to all her children, also to her expectancy of life, and also to the decreased purchasing power of the dollar since the European War, we cannot say that the damages awarded by the jury are excessive.

Finding no reversible error in the record, the judgment of the Superior court is affirmed.

AFFIRMED.

Barnes, F. J., and Scanlan, J., concur.

negligent killing of a woman, who left surviving her adult children and there was evidence tending to prove that they had derived a benefit from her life, the monetary value of that benefit must be left to the jury. In McFarlane v. Chicago City R. Co., 208 Ill. 171, 172, where plaintiff's intestate had been a widow, 47 years of age, and had adult children living with her, it is said: "There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the life. These children might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate. It is not for the court to determine what the loss would have been. The extent of the pecuniary loss can be ascertained with certainty, and one of the elements of pecuniary loss in the personal tort case of deceased." In the present case, the deceased's expectancy of life, at 35 years of age, was about 17 years according to the actuarial tables, of which courts take judicial notice. (McFarlane v. Chicago City R. Co., 208 Ill. 171, 172; McFarlane v. Chicago City R. Co., 208 Ill. 171, 172.) When consideration is given to the act itself, and attention which the evidence in the present case shows the deceased had bestowed upon the two daughters who had been living with her, also to the pecuniary value of her life as measured by services rendered to all her children, also to her expectancy of life, and also to the deceased's entire power of the dollar which she possessed, we cannot say that the damages awarded by the jury are excessive.

Finding no reversible error in the record, the judgment of the superior court is affirmed.

APPROVED.

Wm. H. H. and Son, J. J. Co., Chicago.

ACME INTERNATIONAL X-RAY COMPANY,
a corporation,
Appellant,

v.

MARYLAND CASUALTY COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRINDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit, commenced May 6, 1926, based upon a policy of fidelity insurance, there was a trial before a jury in June, 1927, resulting in a verdict and judgment in favor of defendant and plaintiff appealed.

The policy is dated May 1, 1925, and, as shown in the original schedule attached thereto, has reference to eight named employees of plaintiff. The policy provides that upon application other employees may be added from time to time, and on June 19, 1925, defendant, in consideration of an additional premium of \$41.20, paid to it, delivered an additional schedule wherein there was added to the policy an employee named J. J. Grobe, production manager of plaintiff, insurance of \$10,000 to stand as to him after July 1, 1925. By the policy defendant guaranteed to pay to plaintiff, the employer, "such pecuniary loss," as it should sustain, "of Money, Bonds, Debentures, Stocks, Certificates, Warrants, Transfers, Coupons, Bills of Exchange, Promissory notes, Checks, Bank Notes, Currency, Merchandise, or other property * * occasioned by any act or acts of Fraud, Dishonesty, Forgery, Theft, Larceny, Embezzlement, Wrongful Abstraction or Misapplication or Misappropriation, or any Criminal Act, by any of the employees listed hereunder, directly

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines. The Commission is deeply concerned that the Government of the United States is not taking adequate steps to ensure that the American Friends Service Committee is not engaged in activities which are contrary to the interests of the United States.

The policy is dated May 1, 1968, and, as shown in the original schedule attached hereto, was retroactive to the named employees of subsidiary. The policy provides that upon termination other employees may be added from time to time, and as of May 10, 1968, defendant, in consideration of an

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or through connivance in any position or at any location in the employer's employ, and during the period commencing April 30, 1925, and continuing in the amounts named until the termination of this insurance, and discovered within 24 months" thereafter.

Plaintiff's declaration consisted of one count. The policy is set out in haec verba, and it is alleged in substance that on April 30, 1925, plaintiff was engaged in the manufacture of X-ray apparatus and supplies, etc., in Chicago, and had a large number of employees working for it; that on May 1, 1925, defendant issued the policy, and on June 19, 1925, in consideration of the additional premium, delivered to plaintiff said additional schedule; that from February, 1923, and continuously thereafter plaintiff was engaged in its said business; that from February, 1923, and until August 11, 1925, said Grobe was its production manager, and as such had direct charge of plaintiff's manufacturing department and of its employees therein; that in the fall of 1924, he, without plaintiff's knowledge or that of its officers or directors, "confederated and conspired with certain of plaintiff's employees," engaged in said manufacturing department and who were under his direction and control, by which he and they agreed that they, at any time and at his direction, "would destroy certain property of plaintiff and remove certain other property of plaintiff from plaintiff's premises and abstract from its files valuable papers and files, for the purpose of crippling, injuring and damaging its business, and for the purpose of forcing plaintiff to meet unjust, unfair and unreasonable demands which might be proposed by said J. J. Grobe;" that in furtherance of the unlawful conspiracy Grobe, between August 1st and 11th, 1925, directed said employees "to destroy or cause to be destroyed valuable

or through assignment in any position or at any location in the
employer's employ, and during the period commencing April 30,
1933, and continuing in the amount named until the termination
of this insurance, and discovered within 14 months thereafter.
Plaintiff's declaration consisted of one count. The
policy is set out in Exhibit A, and it is alleged in substance
that on April 30, 1933, Plaintiff was engaged in the manufacture
of X-ray apparatus and supplies, etc., in Chicago, and had a
large number of employees working for it; that on May 1, 1933,
defendant issued the policy, and on June 10, 1933, in consideration
of the additional premium, delivered to Plaintiff said additional
amounts due from February, 1933, and continuously thereafter.
Plaintiff was engaged in the said business until from February,
1933, and until August 11, 1935, said time was the expiration
manager, and as such had direct charge of Plaintiff's manufacturing
department and of its employees working; that in the fall of 1934,
he, without Plaintiff's knowledge or that of its officers or
directors, "contacted and conspired with certain of Plaintiff's
employees," namely in said manufacturing department and who were
under the direction and control of Plaintiff, to cause the same to
they, at any time and at his direction, "would thereby obtain
property of Plaintiff and remove certain other property of Plaintiff
with from Plaintiff's premises and abscond from the same valuable
papers and files, for the purpose of obtaining, retaining and
conducting its business, and for the purpose of forcing Plaintiff
to meet unjust, unfair and unreasonable demands which might be
proposed by said J. E. Gandy," that in pursuance of the defendant
conspiracy Gandy, between August 1st and 11th, 1935, absconded
said employees, "to thereby or cause to be destroyed valuable

drawings, patterns and experimental apparatus," the property of plaintiff, "or to remove the same from plaintiff's premises," and that they, acting upon his orders, did between said dates destroy or remove the same (here are mentioned and described certain designs and drawings and four so-called "experimental models"); that about August 11, 1925, Grobe "took or caused to be taken" from plaintiff's place of business a certain file of manufacturing data and instructions, or designing data, also a file of correspondence with plaintiff's customers, also a file containing the drawings, specifications and correspondence of a new X-ray apparatus, all the property of plaintiff and of great value to it; that the loss of the files and the damage to or destruction of, or the removal of, plaintiff's said property was not discovered until August 12, 1925, when it immediately gave notice of loss to defendant, and also within 60 days furnished to it complete proofs of loss, as required by the policy; and that defendant has refused to indemnify plaintiff, to its damage, etc. The declaration was supported by an affidavit of claim.

Defendant filed a plea of the general issue, together with an affidavit of merits in which it is stated that Grobe did not conspire with said employees as charged, and did not remove or destroy, or cause to be removed or destroyed, any of plaintiff's property as charged; that the loss as claimed is not covered by the policy; and that plaintiff "was fully advised in advance of whatever acts it complains of, and could have prevented the same."

On the trial plaintiff, in addition to introducing the policy, certain photographs, instruments and writings, called ten witnesses, among them Frank L. Beverance, who became general manager of plaintiff on August 1, 1925, and who, on August 11, 1925, discharged Grobe from his position as plaintiff's production

1938. Plaintiff's motion for summary judgment is denied. The court finds that the evidence is conflicting as to whether or not the defendant acted reasonably in removing the photographs. The court also finds that the defendant acted reasonably in removing the photographs from the newspaper. The court grants summary judgment in favor of the defendant.

manager, and George Rannnen, who was foreman of plaintiff's tool and experimental department and who, while Grobe was acting as production manager, was subject to the latter's orders. For defendant, Grobe testified, as did also Edwin S. Humphreys and James S. Thelen, employees of plaintiff, also under Grobe, and who, shortly after Grobe's discharge, resigned their positions and ceased working for plaintiff.

The main grounds for reversal, as urged by plaintiff's counsel, are in substance (1) that the verdict is manifestly against the weight of the evidence; and (2) that such verdict probably was occasioned (a) by the court, over objections, erroneously giving to the jury instructions Nos. 12 and 14, offered by defendant, and (b) by the court, over objection, erroneously allowing repeated references to be made by defendant's attorney, during his address to the jury and during the introduction of evidence, to an irrelevant and immaterial matter, viz, that, prior to Grobe's discharge, there were dissensions and disputes between two factions of the stockholders of plaintiff as to the management of its business, to one of which factions, not owning the control of the stock, Grobe belonged.

We have carefully reviewed the somewhat voluminous evidence and are of the opinion that there is merit in the contentions and that there should be another trial of the cause. The testimony of plaintiff's witnesses, supported by certain exhibits, disclosed that there was a conspiracy between Grobe and certain of plaintiff's employees who were in his particular department and subject to his orders substantially as charged, and that, about the time of Grobe's discharge, the conspiracy was consummated substantially as charged, and that by reason of the acts of Grobe and the other conspirators, which amounted to

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The main grounds for reversal, as urged by plaintiff's
counsel, are in substance (1) that the verdict is manifestly
against the weight of the evidence; and (2) that such verdict
probably was occasioned (a) by the court, over objection,
erroneously giving to the jury instructions Nos. 12 and 13,
urged by defendant, and (b) by the court, over objection,
erroneously allowing repeated reference to be made by defendant's
attorney, during his address to the jury and during the introduction
of evidence, to an irrelevant and immaterial matter, viz, that,
prior to Grobe's discharge, there were discussions and disputes
between the partners of the stockholders of plaintiff as to the
management of the business, to one of which factum, not coming
the contrary of the fact, Grobe belonged.

We have carefully reviewed the somewhat voluminous
evidence and are of the opinion that there is merit in the con-
tention and that there should be another trial of the cause.
The testimony of plaintiff's witnesses, supported by certain
exhibits, discloses that there was a conspiracy between Grobe
and certain of plaintiff's employees who were in his position
of trust and subject to his orders substantially as charged, and
that, about the time of Grobe's discharge, the conspiracy was
unmasked substantially as charged, and that by reason of
the acts of Grobe and the other conspirators, which amounted to

criminal acts, plaintiff suffered pecuniary loss of merchandise and property, to the extent of about \$4,000. Grobe, Humphreys and Thelen denied entering into any conspiracy or doing any acts in consummation thereof, as testified to by plaintiff's witnesses. As there doubtless will be another trial of the cause we shall refrain from discussing the evidence more in detail. We think it is clear, however, that, of the true facts are as disclosed by plaintiff's evidence, the loss suffered by plaintiff is covered by the policy. and we think that given instructions Nos. 12 and 14, offered by defendant, were, under the terms of the policy and the evidence, erroneous and prejudicial to plaintiff. Instruction No. 12 told the jury that, even though they believed from the evidence that certain of plaintiff's employees other than Grobe removed certain property from plaintiff's plant, "yet there can be no recovery in this case on account thereof unless you believe from the evidence and under the instructions of the court that such employees acted under the orders and directions of Grobe, and that employee, Grobe, in giving such orders, was guilty of an act or acts of fraud, dishonesty, theft, larceny, embezzlement or misapplication or misappropriation or any criminal act." In No. 14 the jury were told that "there can be no recovery in this case on account of the dismantling or taking apart of any machine or machines unless you believe that plaintiff has established by a preponderance of the evidence that such dismantling or taking apart of such machine or machines was done by employee Grobe or under his direction or orders, and that such act or acts of Grobe constituted an act of fraud, dishonesty, theft, larceny, embezzlement, wrongful abstraction, or misapplication, or misappropriation, or any criminal act, under the terms of the insurance policy introduced in evidence." These instructions, as we read them, leave out of consideration

criminal acts, Plaintiff suffered pecuniary loss of approximately
and property, to the extent of about \$1,000.00. Grobe, Humphrey
and Thelen denied entering into any conspiracy or doing any acts
in connection therewith, as testified to by Plaintiff's witnesses.
It is now doubtful that as another trial of this cause will result
in a finding from the evidence that the evidence was in detail. It is
as a result, however, that of the time taken and as discussed
by Plaintiff's evidence and loss suffered by Plaintiff is covered
by the policy. And as such that given instructions Nos. 12 and
13, offered by defendant, were, under the terms of the policy
and the evidence, erroneous and prejudicial to Plaintiff.
Instruction No. 12 is the jury that, even though they believed
from the evidence that certain of Plaintiff's employees other than
those removed certain property from Plaintiff's plant, yet
it is not necessary in this case to account for the removal of the
property from the evidence and under the instructions of the
court that each employee acted under the threat and direction of
Grobe, and that Humphrey, Thelen, and Thelen, who testified
of an act or acts of threat, intimidation, bribery, and coercion
or manipulation or misrepresentation or any criminal act. It
No. 12 the jury were told that "there can be no recovery in this
case on account of the dissemination of untrue facts of any machine
or machine which you believe that Plaintiff has disseminated by a
representation of the evidence that each disseminating or taking apart
of such machine or machine was done by employee Grobe or under his
direction, and that each act or acts of Grobe constituted
an act of threat, intimidation, bribery, coercion, misrepresentation,
or manipulation, or misrepresentation, or any criminal
act, under the terms of the insurance policy introduced as evidence."
These instructions, as we have shown, have not of misrepresentation

entirely the theory of plaintiff's case, as stated in its declaration and as disclosed from its evidence, viz, that Grobe and said employees entered into a conspiracy (a criminal act), which was consummated, to injure plaintiff's business by the removal of certain of its tools and records and the destruction of certain of its experimental machinery. Under these instructions, even though the jury believed plaintiff's evidence as to the conspiracy and the consummation thereof, they were told in effect that, unless plaintiff showed by a preponderance of evidence that Grobe actually directed the removal of the particular property removed, or actually himself dismantled the machinery (showed by the evidence to have been dismantled) or directed or ordered its dismantling, plaintiff could not recover. Under the evidence these instructions practically amounted to a directed verdict for defendant. And we think that the repeated references of defendant's attorney during the trial to the irrelevant and immaterial matter, as above mentioned, tended to mislead and confuse the jury as to the real issues of the case.

For the reasons indicated the judgment of the Circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, F. J., and Scanlan, J., concur.

entirely the theory of Alvin's case, as stated in the
deposition and as disclosed from the evidence, viz. that
and said employee entered into a conspiracy in violation of
which was consummated, to injure Alvin's business by the
removal of certain of its tools and records and the destruction
of each of its experimental machinery. Under these instructions
even though the jury believed Alvin's evidence as to the
conspiracy and the consummation thereof, they were told in effect
that unless Alvin's showed by a preponderance of evidence that
he actually directed the removal of the particular property
removed, or actually himself directed the machinery (showed by
the witness to have been dismantled) or directed or caused the
dismantling, Alvin's could not recover. Under the evidence
presented in this case, the jury was told to a substantial
degree that they should not think that the repeated testimony of
Alvin's witness was true in the absence of other
substantial matter, as above mentioned, tended to sustain and con-
firm the jury as to the real issues of the case.
For the reasons indicated the judgment of the Circuit
court is reversed and the cause is remanded.

JAMES JIRCA,
Appellee,

v.

L. HLAVEC,
Appellant.APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in case, tried in the County court without a jury, for damages to plaintiff's auto-truck, occasioned by its collision with defendant's automobile in the intersection of Ogden and 49th avenues, in the town of Cicero, Cook county, Illinois, early in the afternoon of July 26, 1923, there was a finding and judgment for \$259.62, on March 31, 1927, against defendant and he appealed.

Ogden avenue is a state trunk highway and runs in a northeasterly and southwesterly direction, and 49th avenue (a north and south street) intersects it, but does not extend north of it. Each street is about 30 feet wide from curb to curb.

Plaintiff's declaration consisted of two counts. In the first it is alleged in substance that defendant was driving his automobile northeasterly on the south side of Ogden avenue; that plaintiff, by an agent, "while in the exercise of due care and caution for the safety of his own property, and that of others," was driving his auto-truck in a southwesterly direction on the north side of Ogden avenue at and near where it intersects 49th avenue; and that defendant so carelessly and negligently drove his automobile that it collided with plaintiff's truck, greatly damaging it, etc. In the second count defendant is charged

with negligence in operating his automobile at a speed greater than was reasonable and proper, etc., in violation of the provisions of section 22 of the Motor-Vehicle Law. To both counts defendant filed a plea of the general issue.

Upon the trial four occurrence witnesses testified. For the plaintiff they were Ray Jirsa, son of plaintiff, 16 years old, who was driving the auto-truck, and Anton Janeecki, who was standing at the southeast corner of the intersection at the time. Defendant, the driver of the automobile, testified in his own behalf and George Starke for him. Starke, at the time, was in charge of a standing freight train on the tracks of the Chicago, Burlington & Quincy Railroad, which are immediately north of Ogden avenue. He observed the movements of both automobiles both before and after they entered the intersection of the two streets.

The evidence is conflicting as to speeds of the respective cars but it sufficiently appears that both were moving at excessive rates of speed, both before and after entering the intersection. The evidence further discloses that plaintiff's truck was moving southeasterly, on the north side of Ogden avenue, approaching and near to the intersection; that at the same time defendant's automobile was moving northeasterly, on the south side of Ogden avenue, approaching and near to the intersection, but not quite so near thereto as was the truck; that suddenly, without blowing his horn, without materially checking the speed of plaintiff's truck, and without attempting to first go to the right of the center of the intersection, the driver of the truck made a left turn into 49th avenue in front of defendant's on-coming automobile; and that, as a result, defendant turning his car to the right and towards the south in the endeavor to avoid striking plaintiff's truck head-on, the left front side of the automobile collided with the right front side of the truck, near the south line of Ogden

with negligence in operating his automobile at a speed greater than was reasonable and proper, and in violation of the provisions of section 22 of the Motor-Vehicle Law. To both counts defendant filed a plea of the general issue.

Upon the trial four occurrence witnesses testified.

For the plaintiff they were Ray Green, son of plaintiff, 10 years old, who was driving the automobile, and Arthur Jensen, who was standing at the southeast corner of the intersection at the time. Defendant, the driver of the automobile, testified in his own behalf and George Smith for him. Smith, at the time, was in charge of a standing freight train on the tracks of the Chicago Burlington & Quincy Railroad, which are immediately west of Ogden Avenue. He observed the movement of both automobiles both before and after they entered the intersection of the two streets. The evidence is conflicting as to speed of the respective

cars but it is totally apparent that both were moving at excessive rates of speed, both before and after entering the intersection. The evidence further discloses that plaintiff's truck was moving southwesterly, on the north side of Ogden Avenue, approaching and near to the intersection and that at the same time defendant's automobile was moving northerly, on the south side of Ogden Avenue, approaching and near to the intersection, but not quite so near. Thereafter, as was the custom, both automobiles, without blowing his horn, without materially checking the speed of plaintiff's truck, and without attempting to find as to the right of the way of the intersection, the driver of the truck went a foot or two into the lane in front of defendant's on-coming automobile; and that, as a result, defendant turning his car to the right and toward the south in an endeavor to avoid striking plaintiff's truck, the left front side of the automobile collided with the

right front side of the truck, near the south side of Ogden

avenue and alightly east of the center line of 49th avenue. Both cars were damaged.

after considering all the facts and circumstances in evidence, we are of the opinion that plaintiff ought not to recover anything from defendant and that the judgment against defendant should be reversed. In section 40 of the Motor Vehicle Law it is in part provided:

"Whenever a person operating a motor vehicle shall meet on a public highway * * any other vehicle, the person so operating such motor vehicle or vehicles * * shall each seasonably turn to the right of the center of the beaten track of such highway so as to pass without interference. * * Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the center of such intersection of such highway when turning to the right, and pass to the right of the center of such intersection when turning to the left."

In the present case, the driver of plaintiff's truck, when it was approaching and was near to the intersection, saw defendant's automobile rapidly approaching the intersection from the opposite direction, and not far from said intersection, yet said driver, in violation of said statute, endeavored to quickly turn the truck to the left into 49th avenue, immediately in front of defendant's oncoming car. This was negligence on his part which proximately contributed to the accident.

The judgment of the County court is reversed without remending the cause.

REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Scanlan, J., concur.

avenue and slightly east of the center line of 10th Avenue. Both

After consulting all the facts and circumstances in evidence, we are of the opinion that Plaintiff ought not to recover anything from defendant and that the judgment against defendant should be reversed. In section 40 of the Motor Vehicle Law it is provided:

"Whenever a person operating a motor vehicle shall meet on a public highway any other vehicle, the driver of such motor vehicle shall keep to the right of the center of the highway as much as practicable so as to pass without interference." "Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the center of such highway of such highway when turning to the right."

In the present case, the driver of Plaintiff's truck when it was approaching and was near to the intersection, and defendant's automobile rapidly approaching the intersection from the opposite direction, and was far from said intersection, yet said driver, in violation of said statute, endeavored to pass from the truck to the left into 10th Avenue, thereby causing the defendant's oncoming car. This was negligence on his part which proximately contributed to the accident.

The judgment of the County Court is reversed without

costs to either party.

REVEREND JUDGE OF THE COURT.

REVEREND JUDGE OF THE COURT.

REVEREND JUDGE OF THE COURT.

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FINDING OF FACT.

We find as an ultimate fact in this case that, at and immediately before the time of the collision of the two automobiles, the driver of plaintiff's truck was guilty of negligence which proximately contributed to the accident and to the damage to said truck.

LOUIS FRIMBERG,
Appellant.

v.

WILLIAM J. OAKLEY and
CHARLES NETTLETON;
HARTMAN FURNITURE &
CARPET CO., a corporation,
and I. KOHN and S. BENAMY,
Appellees.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 26, 1925, plaintiff commenced an action for damages against said Oakley and Nettleton and said Hartman Furniture Co., a corporation, for personal injuries received in an accident occurring early in the afternoon of October 29, 1924, on Cottage Grove avenue, about 130 feet south of 35th street, Chicago. On October 28, 1926, the court gave plaintiff leave to make Kohn and Benamy additional parties defendant and to file an amended declaration, which consisted of five counts and to which all defendants filed pleas of the general issue. During a jury trial in May, 1927, plaintiff withdrew the fourth count and, at the conclusion of his evidence, the court, out of the presence of the jury, granted the several motions of Hartman Furniture Co., Kohn and Benamy that the jury be instructed to find each not guilty. After the jury were again in the box, the court, instead of then giving them written instructions to that effect, told them that all defendants "are now out of the case except Oakley and Nettleton." To this method of procedure plaintiff's attorney did not object, and, thereupon, the attorney for the Hartman Furniture Co. and Kohn and Benamy left the court

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APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

LOUIS B. HENNING,
Appellant,
vs.
WILLIAM L. BARTY AND
CHARLES H. HENNING,
Respondents.
Circuit No. 1, Chicago.
Jury Trial and Verdict.
Filed.

THE FOLLOWING IS THE VERDICT AND THE OPINION OF THE COURT.

On May 26, 1935, plaintiff commenced an action for

damages against said Barty and Henning and said Henning

Insurance Co., a corporation, for personal injuries received

in an accident occurring early in the afternoon of October 26,

1934, on Cottage Grove street, about 100 feet south of 26th

street, Chicago. On October 26, 1934, the court gave plaintiff

leave to make John and Henry additional parties defendants and

to file an amended declaration, which consisted of five counts

and to which all defendants filed pleas of the general issue.

During a jury trial in May, 1937, plaintiff withdrew the fourth

count and, at the conclusion of his evidence, the court, out

of the presence of the jury, granted the several motions of

William Insurance Co., John and Henry that the jury be instructed

to find each not guilty. After the jury were again in the box,

the court, instead of then giving them written instructions as

requested, told them that all testimony was in dispute and that

each witness was to be believed. The jury returned its verdict

that the plaintiff received no damages and that the defendant

was entitled to costs and disbursements.

room and they did not further participate in the trial, and, thereupon, Oakley and Nettleton, called three witnesses in their behalf, who were examined and cross-examined at considerable length; After arguments the court gave certain written instructions, - some being offered by plaintiff and others by Oakley and Nettleton. Thereupon the court instructed the jury in writing to return a verdict finding the Hartman Furniture Co. not guilty, and another verdict finding Kohn and Benamy not guilty, and also gave them forms of not guilty verdicts, which they subsequently returned as instructed. At the same time the court gave them the two usual forms of verdict as to Oakley and Nettleton and, after deliberation, they returned a verdict in proper form finding them not guilty. On May 14, 1927, after overruling motions for a new trial and in arrest of judgment, the court entered judgments on the verdicts against plaintiff and in favor of the several defendants for costs. This appeal followed.

Cottage Grove avenue runs in a northwesterly and southeasterly direction and there are double street car tracks in the street. It is intersected by 35th street, - an east and west street. In the first count of the amended declaration plaintiff alleged in substance that on October 29, 1924, he was sitting in and driving his horse-drawn wagon northerly in Cottage Grove avenue, tracking in the east or north bound car tracks between 35th and 36th streets, and exercising due care for his own safety, etc.; that defendants, Oakley and Nettleton, were the owners of, and then by an agent were operating, a heavy auto-truck, containing gravel, southerly in the avenue, south of the intersection; that the defendants, Hartman Furniture Co. and Kohn and Benamy, were then and there jointly controlling and operating by an agent another

room and they did not furnish participants in the trial, and, therefore, they and Heston, called upon witnesses in their behalf, who were examined and cross-examined as considerable length. After arguments the court gave certain written instructions, - some being offered by plaintiff and others by Okey and Heston. Thereupon the court instructed the jury in writing to return a verdict finding the Heston Thurnston Co. not guilty, and another verdict finding Heston and Heston not guilty, and also gave them terms of not guilty verdicts, which they subsequently returned as instructed. At the same time the court gave them the two usual forms of verdict as to Okey and Heston and, after deliberation, they returned a verdict in proper form finding them not guilty. On May 14, 1937, after overruling motions for a new trial and in arrest of judgment, the court entered judgment on the verdicts against plaintiff and in favor of the several defendants for costs. This appeal follows.

Cottage Grove avenue runs in a northeasterly and southeasterly direction and there are double street car tracks in the street. It is intersected by 35th street, - on east and west streets. In the first count of the amended complaint plaintiff alleged in substance that on October 29, 1936, he was driving in and driving his horse-drawn wagon north in Cottage Grove avenue, the way in the east or north bound car tracks between 35th and 36th streets, and proceeding the way for his own safety, etc., that defendants, Okey and Heston, were the owners of, and then by an agent were operating, a heavy truck, containing gravel, entirely in the wrong, south of the intersection; that the truck was driven in such a manner as to cause the plaintiff's truck to be overturned and the plaintiff to be injured.

smaller auto-truck, containing furniture, southerly in said avenue; and that, by reason of the negligence of the drivers of the two trucks, the gravel truck, owned by Oakey and Nettleton, collided with plaintiff's wagon and he was thrown to the street and suffered serious and permanent injuries. The other counts are similar to the first but in different verbiage.

On the trial, as to the details of the accident, plaintiff and three witnesses called by him testified. Their testimony was to the effect that plaintiff, a junk peddler, about 65 years old, was driving his horse and wagon at a slow pace northerly in Cottage Grove avenue, the wheels of the wagon tracking in the north bound car tracks, which are on the east side of the street; that immediately prior to the accident the large and heavy gravel truck, owned by Oakey and Nettleton, was moving southerly partly between the two car tracks and attempting to pass to the left of the furniture truck which also was moving southerly; and that, in making the attempt, collided with the left front wheel of plaintiff's wagon, breaking it and causing plaintiff to be thrown suddenly to the ground, from which fall he suffered serious and permanent injuries, and also damage to his wagon. Plaintiff testified: "My horse was walking. A loaded sand and gravel truck hit me. When I first noticed this truck it was coming south between the two tracks with its left wheels in my track. * * It came pretty swift and its left front wheel came right into my wheel and busted it, and down went the wagon and out I went. * * When I noticed the truck coming between the two tracks, I tried to pull the right line, but before I had a chance to pull the horse out, the truck was right at my wheel." One of plaintiff's witnesses, Lorber, standing in front of a

plaintiff's car-truck, containing furniture, was parked in back of the house, by reason of the negligence of the driver of the car-truck, the gravel truck, owned by Gandy and Hollister, collided with plaintiff's wagon and he was thrown to the ground and suffered serious and permanent injuries. The other counts are similar to the first but in different respects.

On the trial, as on the trial of the accident, plaintiff and three witnesses called by him testified. Their testimony was to the effect that plaintiff, a truck driver, about 35 years old, was driving his horse and wagon at a slow pace northward in Cottage Grove avenue, the whole of the wagon standing in the north bound car track, which was on the east side of the street, that immediately prior to the accident the large and heavy gravel truck, owned by Gandy and Hollister, was traveling southwardly partly between the two car tracks and changing its path to the left at the intersection from which it was proceeding, and it collided with the left front wheel of plaintiff's wagon, breaking it and causing plaintiff to be thrown suddenly to the ground, from which fall he suffered serious and permanent injuries, and also damage to his wagon. Plaintiff testified: "My horse was walking. A loaded coal and gravel truck hit me. When I first noticed this truck I was looking south between the two tracks with its left wheel in my track." "It came pretty quick and the left front wheel came right into my wheel and pushed it, and down went the wagon and all I went." "Then I noticed the truck coming between the two tracks. I tried to pull the right line, but before I had a chance to pull the horse out, the truck was right at my wheel." One of plaintiff's witnesses, Robert, standing in front of a

store at 3511 Cottage Grove avenue, testified: "I saw plaintiff's horse and wagon travelling north in the north bound car tracks, going at a slow pace. There was a big dump truck going south, and another truck, a furniture truck, going before the dump truck. * * The dump truck was going to pass to the left of the furniture truck, * * and it ran straight into this wagon. * * The furniture truck was travelling south in the south bound tracks. * * The furniture truck and the dump truck had no collision whatsoever that I noticed." Another of plaintiff's witnesses, Tompkins, driving a sedan automobile southerly in the west car tracks in Cottage Grove avenue, testified: "This big gravel truck that I saw about 50 feet south of me, going south, was the truck involved in the accident. * * It was going about 20 miles per hour * * . It tried to pass this Hartman Furniture truck * *, which was ahead of it, and, as the gravel truck turned to the left, it passed to the left side of the furniture truck, and then Mr. Feinberg, the man driving the wagon, pulled over to the right, but the gravel truck hit his left front wheel, and the gravel truck then hit the rear left wheel of the furniture truck. * * The Furniture truck, which was in front of the gravel truck in the south bound car track did not swerve to the right or left, but stayed in the track all the time."

One of the contentions of plaintiff's counsel, urged for a reversal of the judgments, is that the court erred in sustaining the motions of defendants, Hartman Furniture Co. and Kohn and Benamy, made at the close of plaintiff's evidence, for directed verdicts in their favor, and telling the jury that they were "new out of the case," and directing the cause to proceed only against the remaining defendants, Oakley and Nettleton. Although counsel admit in their brief here filed

that the testimony of plaintiff's witnesses "was not very strong on the question of negligence of the driver of the furniture truck," nevertheless they argue that, because of statements made in the opening addresses to the jury by the attorneys for the respective defendants and the fact of the close proximity of the two trucks at the time of the accident, the court should not have granted said motions, but should have ruled that all defendants should put in their defense. In the opening statement of the attorney for Oakley and Nettleton he said: "So far as Oakley and Nettleton are concerned, we say that this accident happened through no fault of theirs but solely through the fault of the Hartman Furniture Co." In the opening statement of the attorney for the Furniture Co. and Kohn and Benamy, he said: "I expect the evidence will show that our two-ton truck did not force the Oakley and Nettleton's seven and one-half ton truck across into the other side of the street. * * * We did not hit the plaintiff's wagon and did not cause anybody else to hit it, although, as a matter of fact there was a contact between the two trucks." We cannot agree with the contention of plaintiff's counsel or with his argument. Plaintiff's testimony and that of his three eye-witnesses, made out a strong prima facie case of negligence on the part of the driver of the gravel truck, but there was absolutely nothing in that testimony, with all justifiable inferences therefrom, tending to show that the driver of the Furniture truck was in any manner guilty of negligence, proximately causing or contributing to the accident. We think that the court rightly made the ruling complained of, dismissing the Furniture Co. and Kohn and Benamy out of the case.

After said dismissal, the defendants, Oakley and Nettleton, called the driver of the gravel truck, David Ferguson, and two

that the testimony of plaintiff's witnesses "was not very strong on the question of negligence of the driver of the truck," nevertheless they argue that, because of statements made in the opening addresses to the jury by the attorneys for the respective defendant and the fact of the close proximity of the two trucks at the time of the accident, the court should not have granted said motion, but should have ruled that all defendants stand out in their defense. In the opening statement of the attorney for Oakley and Hollister he said: "On the 1st of May, 1934, at the time of the accident, we say that this accident happened through no fault of theirs but solely through the fault of the defendant, the 'Truck Co.' In the opening statement of the attorney for the defendant, the 'Truck Co.' and John and Mary, he said: 'I expect the evidence will show that our truck did not touch the Oakley and Hollister's car and that the truck was in the other side of the street.' " He did not hit the plaintiff's car and did not cause anybody else to hit it, although, as a matter of fact there was a contact between the two trucks." He cannot agree with the contention of plaintiff's counsel or with his argument. Plaintiff's testimony and that of his three eye-witnesses, make out a clear picture of negligence on the part of the driver of the gravel truck, but there was absolutely nothing in that testimony, which all trustworthy witnesses therefrom, tending to show that the driver of the defendant's truck was in any manner guilty of negligence. Proximately causing or contributing to the accident. We think that the facts clearly made the ruling against the defendant, the 'Truck Co.' and John and Mary out of the case. After this statement, the defendant, Oakley and Hollister, called the driver of the gravel truck, David Ferguson, and two

other witnesses. Ferguson, about 36 years old at the time of the accident, testified in part:

"I was in charge of the truck that collided with the horse-drawn vehicle. It was a seven and a half ton truck, metal body, the engine located under the seat where the chauffeur sits and the radiator about a foot ahead of the chauffeur's feet. The front wheels were directly under the chauffeur's feet. The stem of the steering apparatus is mostly straight up and down. * * I had gravel and sand on the truck at that time, about six and one-half tons. * * The gauge of the truck is wider than the gauge of the tracks by about a foot. As I was going south just prior to the accident, the right hand wheels were in the west rail and the left wheels were just east of the inner rail of the south bound track. * * I didn't get out of the tracks once. This furniture truck tried to get in between me and some machines that were standing near the west curb, and its left rear wheel caught my right front wheel and pulled me over into the northbound track. The hub on the wheel of the type of truck I was driving sticks out about half a foot and it is big and solid and made of metal. When the furniture truck struck that wheel it knocked the steering wheel out of my hands and I lost control of my car, and I collided with the horsedrawn wagon. * * The hub of my truck was hit by the furniture truck. * * My wheels had wooden spokes and metal hub-caps that go out beyond the tire. There was a fender there and the hub-cap came out even with the fender. * * The fender was not damaged."

Another of the contentions of plaintiff's counsel, having reference to the jury's verdict finding said defendants, Oakley and Nettleton, owners of the gravel truck, not guilty, is that said verdict is manifestly against the weight of the evidence. After carefully reviewing all the evidence, we have reached the conclusion that the contention has merit and that there should be another trial as to said defendants' liability to plaintiff. It clearly appears from the testimony of all the witnesses that plaintiff, at and before the time of the accident, was not guilty of any negligence contributing thereto. And the testimony of plaintiff, corroborated by three disinterested witnesses, presents a strong case tending to show negligence on the part of the driver of the gravel truck. The testimony of this driver in defense is not satisfactory when certain physical conditions and circumstances are

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...the same as the other two, but the first is the most common.

Will a few new exhibitors help the cause and how in the future

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SECRET, COMBUSTION AND/OR REPRODUCTION OF THIS DOCUMENT IS PROHIBITED

It was found that the above mentioned persons are not the same persons as the persons mentioned in the above mentioned report.

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considered. It is difficult to understand how the very heavy ^{which} truck~~as~~ was driving could have been pulled or pushed by the much lighter furniture truck out of its course and over into the north bound track, merely by the rear wheel of the furniture truck hitting the hub of the right front wheel of the gravel truck and not doing any damage to the fender which was even with the hub. Equally difficult of understanding is the claim, that, because of such a collision, the steering wheel of the gravel truck was knocked out of the hands of its driver and he lost control of the car. The two other witnesses for Oakey and Nettleton claim they saw the accident from another truck, containing vegetables and moving southerly in the avenue somewhere behind the gravel truck. While they corroborate the driver of the gravel truck in some particulars, their testimony is contradictory and unsatisfactory in other material particulars. And we think that it is clearly in the interest of justice that a new trial should be had as to defendants, Oakey and Nettleton. In view of these holdings it is unnecessary for us to consider the further contention of plaintiff's counsel that the court erred in giving certain instructions offered by them to the jury.

For the reasons indicated the judgments for costs in favor of defendants, Hartman Furniture Co. and Kohn and Benamy are affirmed, but the judgment for costs in favor of defendants, Oakey and Nettleton, is reversed, and as to them the cause is remanded for a new trial.

JUDGMENTS FOR CERTAIN DEFENDANTS AFFIRMED;

JUDGMENT FOR OTHER DEFENDANTS REVERSED AND
CAUSE REMANDED.

Barnes, P. J., and Scanlan, J., concur.

FRANK PONCZEK,
Appellee,

v.

PRUDENTIAL INSURANCE
COMPANY OF AMERICA,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRADLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract brought in the name of Frank Ponczek upon a life insurance policy issued by defendant on May 8, 1923, there was a trial before a jury, resulting in a verdict in plaintiff's favor for \$370.42, and a judgment upon the verdict against defendant, entered June 24, 1927. This appeal followed.

As stated in the "schedule" on the face of the policy, the name of the insured is Mary Ponczek (then wife of plaintiff) and her age 25 years at her next birthday, the amount of the insurance is \$356, and the weekly premium 20 cents. In the first paragraph of the policy it is provided that "in consideration of the payment of the weekly premium herein specified, on or before each and every Monday during the continuance of this Policy or until the anniversary date of the Policy immediately preceding the seventieth anniversary of the birth of the Insured," the defendant company "will pay * *, immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, the amount of insurance herein specified to the executors or administrators of the Insured, unless payment be made under the provisions of the next succeeding paragraph; subject to

333 I.A. 652

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

IN SENATE
JANUARY 11, 1934
REPORT OF THE
COMMISSIONER OF INSURANCE
AND FIRE DEPARTMENT

THE CHIEF CLERK OF THE COURT

In a case arising in connection with the same
of Frank Benson upon a life insurance policy issued by defendant
and on May 8, 1933, there was a trial before a jury, resulting
in a verdict in plaintiff's favor for \$370.44, and a judgment
upon the verdict against defendant, entered June 24, 1933.

This appeal followed.

As stated in the "complaint" on the face of the policy,
the name of the insured is Mary Benson (then wife of plaintiff)
and her age 35 years at her most birthday, the amount of the
insurance is \$300, and the weekly premium \$3.

First paragraph of the policy is as provided that "in consideration
of the payment of the weekly premium herein specified, on or
before each and every Monday during the continuance of this policy
or until the anniversary date of the policy issue, latest preceding
the anniversary date of the policy issue, the company will pay to the
beneficiary named in the policy, or to the estate of the insured, or to the
company "will pay" immediately upon receipt of due proof
of the death of the insured during the continuance of this policy.

the provisions of the next succeeding paragraph; subject to
the provisions of the policy.

the 'General Provisions' on the second page hereof, which are hereby made part of this contract."

The next succeeding paragraph is as follows:

"FACILITY OF PAYMENT. It is understood and agreed that the said Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial, or, if the Insured be more than fifteen years of age at the date of this Policy, for any other purpose, and the production by the Company of a receipt signed by any or either of said persons or of other sufficient proof of such payment or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

Another paragraph of the policy, under the heading

"Non-Forfeiture Provisions," is as follows:

"If this Policy lapse for non-payment of premium after premiums have been duly paid for three full years or more, the Insured, without any action upon his or her part, will become entitled to non-participating Extended Insurance for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this Policy had been continued in force, except as to dividend additions subsequent to the date of lapse."

Among the "General Provisions" of the policy is the provision:

"Incontestability. After this Policy shall have been in force, during the lifetime of the Insured, for one full year from its date, it shall be incontestable, except for non-payment of premium. * * ."

In plaintiff's original statement of claim, filed February 11, 1927, he alleges that he was the legally married husband of Mary Ponczek; that "while the policy was in full force" she died during the latter part of July, 1926; that due proof of her death was made, yet defendant has refused to pay

the 'General Provisions' on the second page below, which are

hereby made part of this contract.

The next succeeding paragraph is as follows:

"**ABILITY TO PAYMENT.** It is understood and agreed that the said Company may make any payment or grant any non-refundable provision provided for in this policy to any relative by blood or consanguinity of the insured, or to any person appearing as such company to be entitled to the same as a result of having incurred expenses on behalf of the insured, for his or her burial, or, if the insured be more than fifteen years of age at the date of this policy, for any other purpose, and the provision by the Company of a receipt signed by any or either of said persons or of other authorized agent of such person or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

Another paragraph of the policy, under the heading

"Non-refundable Provisions," is as follows:

"If this policy issue for non-payment of premium after premium have been paid for three full years or more, the insured, without any action upon his or her part, will receive entitled to non-refundable extended insurance for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this policy had been continued in force, except as to dividend additions subsequent to the date of lapse."

Among the "General Provisions" of the policy is the

provision:

"**REINVESTMENT.** After this policy shall have been in force, during the lifetime of the insured, for one full year from its date, it shall be insured for the non-refundable of \$10,000."

In plaintiff's original statement of claim, filed

February 11, 1927, he alleged that he was the legally married

husband of Mary Thomas; that "while the policy was in full

force" and during the latter part of July, 1926; that the

proof of her death was made, yet defendant has refused to pay

to him the amount of the policy; and that there is due to him the sum of \$356 and legal interest thereon from August 1st, 1926. In defendant's affidavit of merits thereto it denied that it owed plaintiff any sum on the policy, because the amount of the insurance, \$356, was payable to the executor or administrator of the Insured, and further denied that all weekly premiums had been paid, or for a term of three years to entitle the insured to extended insurance, - the last payment of the weekly premium having been made on December 21, 1926, less than three years from the date of the policy.

On March 29, 1927, plaintiff was given leave to file, and, on May 11, 1927, without any order having been entered changing the name of the plaintiff in the action, filed, an amended statement of claim, entitled in the name of "Foreman Trust & Savings Bank, a corporation, administrator of the estate of Mary Ponczek" as plaintiff, and making substantially the same allegations.

On May 24, 1927, a second amended statement of claim was filed, entitled in the name of said bank, administrator, as plaintiff, setting forth the policy in haec verba and making substantially the same allegations as in Frank Ponczek's original statement of claim. To this amended statement the company filed an affidavit of merits alleging that, when Mary Ponczek died, the policy had lapsed for failure to pay premiums, and that premiums had not been paid for three full years or more from the date of the policy, and, therefore, the provision as to extended insurance was of no force and effect.

On the trial it appeared from the evidence that Frank Ponczek, his wife, and other members of his family had

twelve life policies of the company, upon which Frank Ponczek from time to time frequently had paid all premiums to agents or collectors of the company; that of these twelve there were four insuring the life of his wife, Mary; and that after her death on July 31, 1926, the company paid certain amounts on some of these four policies, but refused to pay anything on the policy in question upon the grounds that it had lapsed because of non-payment of premiums and that the lapse had accrued before premiums had been paid on the policy "for three full years or more," so that the clause relative to "extended insurance" was of no force or effect. Ponczek testified that on March 17, 1926, he paid \$6.75 in cash to one Dewing, an agent of the company, for premiums on some of the policies, including the one in question, and obtained a written receipt at the time signed by Dewing. This partly and partly printed/written receipt was allowed in evidence, over objection of the company, and a photostatic copy of it is in the present transcript. On its face it gives indication that the date "1926" has been altered from "1925," as originally written by Dewing. In the body of the receipt is the word "revival." Dewing testified that he received the \$6.75 from Ponczek on March 17, 1925, for premiums on certain policies which had then lapsed; that on that day he delivered the paper; that the payment revived the policies, as the word "revival" indicated; and that he made no collection of premiums from Ponczek in March, 1926. Other evidence disclosed that the last payment of any premium on the policy in question was made on December 21, 1925, less than three years after the date of the policy, and that prior to May 5, 1926, the company had declared the policy forfeited for non-payment of premiums.

We think the court erred in admitting said receipt in evidence. It disclosed on its face that it evidently had been

...life policy of the company, upon which Frank Tomasek
from time to time frequently had paid all premium payments or
dividends of the company; that of those twelve there were four
insuring the life of his wife, Mary; and that after her death
on July 21, 1934, the company paid certain amounts on some of
these four policies, but refused to pay anything on the policy
in question upon the ground that it had lapsed because of non-
payment of premiums and that the lapsed had occurred before premium
had been paid on the policy "for three full years or more," so
that the clause relative to "extended insurance" was of no force
or effect. Tomasek testified that on March 17, 1934, he paid \$2.75
in cash to one person, an agent of the company, for premiums on
some of the policies, including the one in question, and obtained
a written receipt at the time signed by him. This partly
written receipt was shown in evidence, over objection
of the company, and a photostatic copy of it is in the present
exhibit. On the face it gives indication that the date "1934"
has been altered from "1935," an originally written by him.
In the body of the receipt is the word "renewal." Having testified
that he received the \$2.75 from Tomasek on March 17, 1934, for
premiums on certain policies which had then lapsed; that on that
day he delivered the report that the payment revived the policies;
as the word "renewal" indicated; and that he made no collection
at premium from Tomasek in March, 1934. Other evidence disclosed
that the last payment of any premium on the policy in question
was made on December 31, 1933, less than three years after the
lapse of the policy, and that prior to May 1, 1934, the company
had received the policy renewed for non-payment of premiums.
He thinks the agent owed in returning said receipt in
evidence. It disclosed on the face that it obviously had been

altered as to its date, and Ponczek did not attempt to offer any explanations as to the alteration. In Gage v. City of Chicago, 225 Ill. 218, 220, it is said: "The law indulges no presumption as to when a change in a written instrument was made, but requires the party offering an altered instrument in evidence, if the alteration is material, to explain such alteration satisfactorily to the court before the instrument will be admitted in evidence. Such explanation may satisfactorily appear from the instrument itself or it may be made by extrinsic evidence." (See, also, Walters v. Short, 10 Ill. 252, 259; Catlin Seal Co. v. Lloyd, 180 Ill. 398, 406; Waggoner v. Clark, 293 Ill. 256, 260.)

And there is another reason why the verdict and judgment in the present case should not be allowed to stand. The policy is made payable "to the executors or administrators of the insured." It is not made payable to Frank Ponczek, the insured's husband, and the "facility of payment" clause in the policy creates no liability on the part of the company to pay to him anything unless it so elects, and it did not so elect. (Griffith v. Prudential Ins. Co., 170 Ill. App. 304, 307; Bishop v. Prudential Life Ins. Co., 217 Ill. App. 112, 113.) Yet it appears that in the verdict and in the judgment order the case is entitled "Frank Ponczek," as plaintiff, and the company as defendant. In the verdict, as so entitled, the jury assesses the "plaintiff's" damages at \$370.42; and in the judgment order, as so entitled, the court directs that the "plaintiff" recover of the company said sum, together with costs. Under such judgment Frank Ponczek can compel the company to pay him individually the amount thereof, although the policy is made payable to the executors or administrators of the insured. Furthermore, the payment of this judgment to him might afford no protection to the company against paying the amount over again at the suit

altered as to the date, and because it was altered to alter

any explanation as to the alteration. In Quinn v. Bell 21

Chancery, 222 Ill. 212, 230, it is said: "The law requires no

presumption as to when a change in a written instrument was made,

but requires the party offering an altered instrument to explain

thereof. If the alteration is material, no explanation such as this

will satisfy the court before the instrument will be admitted

in evidence. Such explanation may satisfactorily appear from the

instrument itself or it may be made by extrinsic evidence." (See,

also, Winters v. Winters, 10 Ill. 232, 233; Callahan v. Co. v. Winters,

130 Ill. 232, 233; Winters v. Winters, 233 Ill. 232, 233.)

It is not enough to show that the parties and judgment

in the instrument were altered to avoid the policy in

made by the law. The execution of an instrument is of the essence.

It is not enough to show that the instrument was altered,

and the "altered" instrument is in the policy book as

liability on the part of the company to pay on the policy book

is no effect, and it is not an effect. (Winters v. Winters)

Winters v. Winters, 130 Ill. 232, 233; Winters v. Winters, 233 Ill. 232, 233.

Q. 217 Ill. 232, 233. Yet it appears that in the verdict

and in the judgment after the case is called "Winters v. Winters."

as a result, and the company as defendant. In the verdict as to

enacted. The law requires the "plaintiff's" damages as \$10,000 and

in the judgment after, as is called, the same; damages that the

"plaintiff" received of the company said sum, together with costs.

Under such the court found that the company to pay

the judgment the amount thereof, although the policy is made

against the company. The administrator of the insured, defendant

the payment of this judgment to him might affect the protection

to the company against paying the amount over again of the same

of the duly appointed administrator of the estate of Mary Ponczek, deceased.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

and the other side of the mountain, the other side of the mountain.

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and the other side of the mountain.

SAMUEL H. FLAMM,
Appellee.

v.

EDWARD GREENSTONE,
ISADORE F. LISBERMAN,
and LU BELL FURNITURE
CO., a corporation,
Appellants.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 24, 1927, complainant filed a bill against defendants, praying for an accounting and for the appointment of a receiver of the defendant, Lu Bell Furniture Co., an Illinois corporation (hereinafter referred to as the Lu Bell Co.) The bill also prayed for a temporary injunction against Edward Greenstone and Isadore F. Lisberman (two of the three directors of the Lu Bell Co.), their attorneys, agents, etc., that they "desist and refrain from holding a directors' meeting, or purported meeting, on December 24, 1927, at 3 o'clock p. m., or at any other time; * * from discharging Samuel H. Flamm as manager of the furniture department business conducted in the department store at the northeast corner of Chicago and Racine avenues, Chicago, * * from removing any merchandise from said furniture department, except in connection with retail sales in the usual course of business; and * * from withdrawing any funds on deposit with the Security Bank of Chicago to the account of Lu Bell Furniture Co.; all until the court shall make order to the contrary." The bill is signed in complainant's name by a firm of solicitors, and attached to it is a certificate of a notary public under his seal, that

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

ANDREW G. GILBERT, JR.,
LEONARD F. LINDENBERG,
and LEONARD F. LINDENBERG,
CO., a corporation,
Appellants.

MR. JUSTICE BRIDGES delivered the opinion of the court.

On December 24, 1927, complaint was filed a bill against
defendants, praying for an accounting and for the appointment
of a receiver of the defendants, in full partnership Co., an Illinois
corporation (hereinafter referred to as the full Co.). The
bill also prayed for a temporary injunction against Leonard Green-
baum and Leonard F. Lindenberg (two of the three directors of
the full Co.), until all money, accounts, and other "beneficial
and retained from holding directors' meetings, or purporting meet-
ings, on December 24, 1927, at 3 o'clock . . . or at any other time
* * * from discharging Leonard H. Greenbaum as manager of the full Co.
* * * from being conducted in the defendant's store at the north-
east corner of Chicago and Halsted streets, Chicago, * * * from
removing any merchandise from said store and payment, except
in connection with retail sales in the usual course of business;
and * * * from withdrawing any funds or deposits with the Security
Bank of Chicago to the account of the full Co. or to any
until the court shall make order to the contrary." The bill is
signed in each name by a clerk of said court, and attached
to it is a certificate of a notary public under his seal, that

on said day complainant personally appeared before him and made oath that he has read the above bill "subscribed by him" and that he knows the contents thereof, and that the same is true of his own knowledge, "except as to the matters which are therein stated to be on his information and belief, and as to these matters he believes them to be true." Some of the material allegations of the bill are only upon the information and belief of the pleader. Also attached to the bill is an affidavit of complainant, sworn to before the same notary, stating that "the rights of complainant will be unduly prejudiced" if an injunction is not issued immediately and without notice. No facts are stated in the affidavit showing in what manner he will be prejudiced if notice be given.

On the same day, upon complainant's motion and without notice to defendants, the court ordered that an injunction issue "as prayed in the bill," and further ordered that "for good cause shown said injunction issue without bond," and that it "shall stand as terminated on December 26, 1927, at 4 o'clock p. m., unless continued in force by order of this court." On December 27th, the defendants entered a joint appearance by solicitor. On December 28th, upon complainant's motion, the court ordered that the injunction be continued in full force until further order. On December 29th, defendants filed a verified answer to the bill, and on the following day moved to dissolve the injunction. On January 3, 1928, the court, apparently being of the opinion that the injunction should only be dissolved upon terms favorable to complainant, entered a draft order to the effect that it be dissolved "upon the defendants, Greenstone and Lieberman, filing their bond in the sum of \$6,000, with good and sufficient surety, to be approved by the court," and conditioned, in substance, that they pay all moneys that may

on said day complainant personally appeared before him and made
oath that he had read the above bill "subscribed by him" and that
he knows the contents thereof, and that the same is true of him
own knowledge. "except as to the matters which are therein stated
to be on his information and belief, and as to those matters he
believes them to be true." None of the material allegations of
the bill are only upon the information and belief of the plaintiff.
The plaintiff is the bill is an affidavit of complaint, sworn to
before the same judge, stating that "the rights of complainant will
be unduly prejudiced" if an injunction is not issued immediately and
without notice. No facts are stated in the affidavit showing in
what manner he will be prejudiced if notice be given.
On the same day, upon complainant's motion and without
notice to defendant, the court ordered that an injunction issue
in the bill. The court further ordered that "for good cause
shown and in justice without delay," and that it "shall stand
as determined on December 22, 1937, at 9 o'clock p. m. when
continued in force by order of this court." On December 27th, the
court entered a joint decree by collector. On December
28th, upon defendant's motion, the court ordered that the injunction
be continued in full force until the next order. On December 29th
the plaintiff filed a verified answer to the bill, and on the following
day moved to dissolve the injunction. On January 1, 1938, the
court, apparently being of the opinion that the injunction should
only be dissolved upon terms favorable to complainant, entered a
decree order to the effect that it be dissolved "upon the defendant
paying to the plaintiff, filing their bond in the sum of \$5,000,
with good and sufficient surety, to be approved by the court."
and condition, in substance, that they pay all money that may

be found due and owing from them, or the defendant corporation, by final decree in the cause, or by final decree on appeal in a higher court, and will also do and perform all acts that may be required of them by such decrees; and further ordered that, upon the filing and approval of the bond, "complainant will immediately refrain and desist from in any manner engaging or interfering with the business of the Lu Bell Furniture Co. * * beyond doing such things as an ordinary stockholder or director of a corporation would in law have a right to do;" and that "this order shall in no way prejudice the rights of complainant, if any he has, to the recovery of compensation now due or hereafter accruing as manager, or under any contract, and without prejudice to any right which he might establish." On January 4th, defendants appeared and moved the court to vacate said order, and that complainant be ruled to file an injunction bond to indemnify defendants in case it be found that the injunction of December 24th was improperly issued. After a hearing the court vacated the order, but overruled defendants' motion that complainant file an injunction bond, and further ordered that the injunction issued on December 24th, "be continued in force until the further order of the court." On January 6, 1928, the defendants filed their appeal bond with the clerk of the circuit court, as by statute provided, appealing to this appellate court from the injunction order of December 24, 1927, and the orders continuing it in force and effect. The bond was approved by the clerk of the circuit court on the same day, and the appeal was perfected in apt time in this appellate court, - the transcript of record being filed here on January 26, 1928.

It is alleged in complainant's bill, inter alia, that on September 16, 1927, complainant and two of the defendants, Greenstone and Lieberman, as lessees in a written lease, jointly leased from

the court was not taking from them, or the defendant's opportunity, by final decision in the cause, or by final decision on appeal in a higher court, and will also to and before all courts that may be required of them by such courts; and further orders that, upon the filing and removal of the bonds, "complaint will immediately return and be set from in any manner regarding or interfering with the business of the Bell Telephone Co.," a person acting under such orders as an ordinary stockholder or director of a corporation would in law have a right to do; and that "this order shall in no way restrict the rights of complainant, if any he has, to the recovery of compensation now due or hereafter accruing as manager, or under any contract, and without prejudice to any rights which he might be entitled to." On January 21, 1907, defendant appeared and moved the court to vacate said order, and that complainant be allowed to file an injunction bond to indemnify defendant in case it be found that the action of December 24th was improperly issued. Then, a hearing the court vacated the order, but overruled defendant's motion for a permanent injunction bond, and further ordered that the injunction issued on December 24th "be continued in force until the further order of the court." On January 8, 1908, the defendant filed a motion for a writ of habeas corpus to be granted by the court, as by statute provided, appealing to this appeal the court from the injunction order of December 24, 1907, and the order continuing it in force and effect. The bond was approved by the clerk of the circuit court on the same day, and the appeal was perfected in due time in this appellate court. - The transcript of record being filed here on January 15, 1908.

It is alleged in complaint: "That, upon the filing of the bonds, the defendant, as manager, as known in a written license, falsely issued from

one Handelsman, owner of a department store located at the corner of Chicago and Racine avenues, certain space in the store, to be occupied by them in carrying on a retail furniture business - said lease vesting in them the right to conduct that business in the space for five years from November 1, 1927, at a rental based upon the sales in the business; that at this time and for years prior thereto defendants owned and operated, under the name of Edward Greenstone Furniture Co., another retail furniture store on Milwaukee avenue; that when the lease was executed complainant and defendants agreed to form a partnership to run the business in the Handelsman store and to put up in cash the sum of \$10,000 as working capital - each to contribute one-third of the sum and to share equally in the profits and losses; that subsequently defendants "induced" complainant to consent to the formation of an Illinois corporation instead, of capital stock of \$10,000 and of which stock each would subscribe one-third thereof to be paid in cash, and the organization of the defendant corporation, Lu Bell Co., was fully completed on October 26, 1927; that each subscribed to stock to the amount of \$3,333.33, and the three parties executed in writing a so-called "subscription agreement" (copy attached to the bill), wherein it is provided, inter alia, that Flamm (complainant) is to devote his entire time as manager of the business at a salary of \$50 per week, that Greenstone and Lieberman, either directly or through said Greenstone Furniture Co. shall do the buying of the merchandise, that in the event that Flamm "is discharged from active employment" in the business "he may at his option require the other subscribers to purchase his shares at cost price, and his employment shall continue until such purchase;" that complainant paid his subscription in cash to said two defendants, Greenstone and Lieberman, and Lieberman promised complainant

to deposit said sum with the Security Bank of Chicago, to the credit of the Lu Bell Co., but has failed to do so; that complainant entered upon his duties as active manager of the business and has since been performing them at a salary of \$50 per week; that at complainant's request an attorney, who had done the necessary legal work in the organization of the company, drafted a set of by-laws, certain proposed corporate records and certain proposed minutes of the first meeting of the board of directors to be adopted at such meeting; that these drafts were submitted to Greenstone and Lieberman but they refused to agree to their adoption; that by said proposed minutes Greenstone was to be elected president of the company, Lieberman treasurer, and complainant secretary and active manager, and it was to be provided that all moneys of the company should be deposited to its credit in said Security Bank and that withdrawals from the account should only be made by checks signed by complainant and either Greenstone or Lieberman; that said defendants have failed to pay their respective subscriptions, and have not deposited the amounts to the credit of the company in said bank; that they pretend that they have paid their subscriptions in full by having delivered to the place of business of the Lu Bell Co. furniture and merchandise, which came from the store of said Greenstone Furniture Co. on Milwaukee avenue; and that nearly all of said merchandise, so delivered, is old and out of date and much of it has proven unsalable.

It is further alleged in the bill in substance that complainant repeatedly has complained to the defendants of their failure to pay their respective stock subscriptions in cash and "of their attempts to use said lessees' premises and said corporation as a dumping ground or clearing house for their own unsalable merchandise;" that because of these complaints defendants have threatened that they will stop shipping any merchandise to

the company, and that if the complaints continued they will arrange to have complainant discharged as active manager of the business; that, as to withholding merchandise, they have since carried out their threats, with the result that the stock of merchandise has become greatly depleted, trade has fallen off, the business is being operated at a loss and complainant's interests therein have been "placed in jeopardy;" that recently complainant received a written notice, purporting to be signed by Lieberman as secretary of the company, although in fact he is not such officer, that there would be a meeting of the directors of the Lu Bell Co. at its office on December 24, 1927, at 3 o'clock p.m.; that the purpose of the meeting is not stated, but, because of defendants' threats, complainant believes that defendants are calling the meeting "for the purpose of repudiating said corporate records, minutes and by-laws, as drafted by said attorney, * * and of so manipulating said meeting as to deprive him (complainant) of the position of secretary and general manager of the company in violation of their agreement, and thereby control and operate the affairs of said corporation to his detriment," and that the holding of said meeting for such a purpose will cause him "irreparable loss" and subject the assets of the company to the "arbitrary disposition" of defendants.

It is further alleged in substance that, under the Handelsman lease, the lessees are obligated at all times to keep on hand a complete stock of merchandise of not less than \$15,000, and to make sales thereof at reasonable prices; that when the lease was executed "it was anticipated" that a deposit of \$10,000 in cash would enable the lessees to obtain a credit of \$5,000, that defendants would assist in obtaining such credit and other credits, but that defendants' conduct, in failing to pay their subscriptions in cash and in using said company as a clearing house for their unsalable

merchandise, has prevented the company from obtaining necessary credit or proper merchandise, and, in consequence thereof, Handelsman threatens to take legal action for breach of the lease, and thereby complainant's interests may be placed "in further jeopardy without fault on his part;" and that defendants' "failure to comply with the provisions of said lease, or to honorably cooperate with him in the performance of its terms, will result in a forfeiture thereof," to complainant's "irreparable loss." It is further alleged that defendants have attempted to forcibly remove merchandise from the company's place of business and have threatened to renew their attempts with greater force; that in the event of such removal, without defendants' compliance with their subscription agreement, complainant will be unable to recover his said investment turned over to them, and he believes he will suffer "irreparable loss" by reason of the imminent suspension of the business and of his liability on the lease; and that defendants "are involved in financial difficulties and embarrassments" and, if permitted to withdraw merchandise without accounting to the corporation for their subscriptions or returning the amount received from complainant on his subscription, he will be unable to recover said amount.

The injunction, granted without notice to defendants and without bond, is a very drastic one. It prevents the directors of a going corporation, engaged in the retail furniture business, from holding a meeting at any time, from discharging complainant as the active manager of the business, and from paying out any of its funds on deposit in a certain bank. It in effect stops the corporation from exercising some of its lawful powers and from conducting its business. The

...has provided the company from obtaining necessary
...or proper maintenance, and in consequence thereof,
...to take legal action for breach of the terms,
...and thereby complainant's interests may be placed "in further
...and that defendant's "altruistic
...to comply with the provisions of said lease, or to honorably ex-
...operate with him in the performance of the terms, will result in
...a "territorial threat", to defendant's "irreparable loss". It
...is further alleged that defendant has attempted to "avoidly re-
...move defendant from the company's place of business and have
...intended to know their message with greater force; that in the
...event of such removal, without defendant's compliance with their
...exhibition a remedy, complainant will be unable to recover his
...and investment turned over to them, and he believes he will suffer
..."irreparable loss" by reason of the business suspension of the
...and of his liability on the lease and that defendant
...is liable in "tortious detentions and wrongdoings" and,
...it is stated to without maintenance without accounting to the
...corporation for their exhibition or refusing the amount re-
...from such lease on his withdrawal, he will be unable to
...return said amount.
...The injunction, granted without notice to defendant
...and without bond, is a very unusual one. It prevents the
...directors of a going corporation, engaged in the retail busi-
...these persons, from holding a meeting at any time, from
...independent complaint as the active manager of the business,
...and from having any of the funds on deposit in a certain
...bank. It is stated also the corporation from receiving money
...of the local board and from conducting its business. The

allegations of the bill disclose that the corporation is an active, going concern, of which complainant is a stockholder and a director, and also manager of its retail furniture business; that the two defendants, Greenstone and Lieberman, are holders of a majority of the stock, are two of the board of three directors, and, when acting together, can control its policy and lawful business actions; that complainant fears that he is about to be discharged as manager of the business; and that, when the corporation was in process of organization for the purpose of conducting a retail furniture business in the Handelsman store under the lease mentioned and complainant had subscribed to one-third of the stock proposed to be issued, complainant and defendants (who had subscribed to the other two-thirds) entered into a so-called "subscription agreement," wherein it was agreed in substance that complainant was to be appointed manager of the proposed business at a salary of \$50 per week, and that, in the event he became such manager and thereafter was discharged from his position, defendants, as the other subscribers, would at his option purchase the shares subscribed by him at cost price, and that his said employment as manager should continue until such purchase was made. As we read the bill, complainant's real motive in filing it and obtaining the temporary injunction as prayed was to compel defendants (in case at said directors' meeting, to be held on December 24, 1927, complainant's discharge as manager was ordered) to immediately pay to him the amount he originally had subscribed for the stock held by him and had paid.

Under these allegations, and the other allegations contained in the bill, we fail to see that such an equitable showing was made as warranted the court, upon reading the bill and attached affidavits, in granting such a drastic injunction,

allegation of the bill, that the corporation is an
active, going concern, of which a large part is a stockholder
and director, and also manager of the retail furniture business;
that the two defendants, Greenbaum and Lieberman, are holders
of a majority of the stock, and two of the board of three directors,
and, when acting together, can control the policy and
conduct of the business; that the corporation has been in about
so long as to be considered a manager of the business; and that, when the
corporation was in process of organization for the purpose of
conducting a retail furniture business in the Homebush area,
under the name mentioned and complaint had been made to the
effect that the stock proposed to be issued, was not
made (who had subscribed to the other two-thirds) entered into
a so-called "subscription agreement," wherein it was agreed to
subscribe that a large part was to be a limited manager of the
retail business at a salary of \$50 per week, and that, in the
event he became such manager and thereafter was discharged from
his position, defendants, as the other subscribers, would at his
request, the shares subscribed by him at cost price, and
that the corporation is now a going concern, and will continue
to operate for years, and that the bill, as amended, is well
in time to be amended, and that the bill, as amended, is well
in time to be amended (in case of said defendant) making, to be
held on December 31, 1937, complaint, a discharge as manager was
ordered) to immediately pay to him the amount he originally had
advanced for the stock sold by him and had paid.
When these allegations, and the other allegations
contained in the bill, are read to you that each an exhibit is
showing was made as warranted the court, upon reading the bill
and attached exhibits, in granting such a discharge in equity.

especially without bond and without notice to defendants, and we are of the opinion that the court erred in issuing the writ. If complainant, at said directors' meeting or thereafter, was discharged from his position, and if, as alleged, defendants had signed the said subscription agreement, he had an adequate remedy at law, by suit upon said agreement, to recover back the aggregate sum he had paid for said stock. It is true the bill alleges that the two defendants "are involved in financial difficulties and embarrassments," but this is a mere conclusion of the pleader. No facts whatever are stated tending to show that their financial condition is such that a judgment for said amount which complainant claims he paid for his stock, could not be collected from them. Furthermore, "it is fundamental in the law of corporations, that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business." (Wheeler v. Pullman Iron Co., 143 Ill. 197, 207.) And, "everyone purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter, and courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued." (Wheeler v. Pullman Iron Co., supra.)

And we think that, after the filing of defendants' verified answer and after their motion to dissolve the injunction, the court erred in continuing it in full force and effect. According to allegations of defendants' answer a much different

...especially without bond and without notice to defendant, and
we are of the opinion that the court acted in issuing the writ.
It complained, at said directors' meeting or thereafter, was
discharged from his position, and it, as alleged, defendant had
signed the said subscription agreement, he had an adequate remedy
at law, by suit upon said agreement, to recover back the amount
and he had paid for said stock. It is true the bill alleges that
the two defendants "are involved in financial difficulties and
embarrassments," but this is a mere conclusion of the pleader.
He sets whatever are stated tending to show that their financial
condition is such that a judgment for said amount which could have
been paid for his stock, could not be collected from them.
Furthermore, "it is fundamental in the law of corporations, that
the majority of the stockholders shall control the policy of the
corporation, and regulate and govern the internal matters of the
corporation and business." Smith v. Smith, 101 Cal. 111.
...and proceedings done or sanctioned by a majority of the share-
holders, or by the agents of the corporation duly chosen by such
majority, within the scope of the powers conferred by the charter,
and course of equity will not undertake to control the policy or
business matters of a corporation, although it may be seen that
a wise policy might be adopted and the business more successful.
It also states that the following were the reasons:
...and we think that, after the filing of defendant's
written answer and after their motion to dissolve the injunction,
the court acted in continuing it in full force and effect.
...according to allegations of defendant's answer a much different

situation existed than that attempted to be portrayed in the bill. While admitting the execution of the Handelsman lease, the organization of the Lu Bell Co., that it was conducting its business in such department store, that complainant had been and was acting as manager of the business at a salary of \$50 per week, and that he was one of the three directors of the company and the owner of one-third of its issued capital stock, defendants denied that they had executed the agreement as set forth in the bill, or that they, or either of them, ever had agreed with complainant that, in the event of his discharge as such manager, they would purchase the stock owned by him at cost price, or at any price, or that his position and salary as manager were to continue until such purchase was made, and denied that they ever agreed that he was to be secretary of the company, or that he ever was elected as such officer, and denied that they ever agreed with him that each subscriber to the capital stock would pay in cash one-third of the \$10,000 stock to be issued. They alleged that the arrangements as to the payment of the subscribed for stock were that complainant and defendants would put in as the capital stock of the company "\$10,000 worth of furniture;" that such furniture and to that worth actually was delivered to the place of business of the company; and that complainant paid his one-third for said merchandise to the Greenstone Furniture Co., which delivered it to the Lu Bell Co.; that one Irving Flamm, a brother of complainant and one of his solicitors of record, represented complainant and defendants in the transactions pertaining to the incorporation of the Lu Bell Co., that defendants told him that the entire capital stock of \$10,000 would be represented wholly by said merchandise, and that, as a matter of fact, no cash was arranged to be paid, or actually was paid, to the corporation; that the merchandise, so delivered to

allegation existed from that alleged to be conveyed in the bill. While admitting the execution of the Henderson license, the organization of the In Bell Co., that it was conducting the business in such department store, that management had been and was acting as manager of the business at a salary of \$50 per week, and that he was one of the three directors of the company and the owner of one-third of its issued capital stock, Henderson denied that they had executed the agreement as set forth in the bill, or that they, or either of them, ever had agreed with complainant that, in the event of his discharge as such manager, they would purchase the stock owned by him at cost price, or at any price, or that his position was such as to require him to do so. Henderson was asked, and denied that they ever agreed that he was to be secretary of the company, or that he ever was elected as such officer, and denied that they ever agreed with him that each subscriber to the capital stock would pay in cash one-third of the \$10,000 stock to be issued. They alleged that the complainant as to the payment of the subscribed for stock were that complainant and Henderson would put in as the capital stock of the company \$10,000 worth of securities, that each turnstile and to that would actually be delivered to the place of business of the company; and that complainant paid the one-third for said merchandise to the respective turnstile Co., which delivered it to the In Bell Co.; and one Irving Weiss, a brother of complainant and one of his solicitors of record, represented complainant and Henderson in the transaction pertaining to the incorporation of the In Bell Co., that Henderson told him that the entire capital stock of \$10,000 would be represented wholly by said merchandise, and that, as a matter of fact, no cash was required to be paid, or actually was paid, to the company; that the merchandise, as delivered to

the company, had shortly before been purchased by the Greenstone Furniture Co. and held in its original crates in storage and was not second hand or unsalable furniture; that the first meeting of the directors of the Lu Bell Co. was held on November 7, 1927, at which complainant and defendants were present; that certain proposed minutes and by-laws, which had been drafted by said Irving Flamm, were presented for adoption and defendants objected to the same as drafted, saying that they, being a majority of the board, desired some changes; that thereupon an argument ensued relative to certain provisions in the proposed by-laws, resulting in complainant leaving the meeting; that thereafter, the meeting continuing, by-laws were adopted by a majority of the directors and Greenstone was elected president of the company, and Lieberman secretary and treasurer; and that a resolution was passed to the effect that complainant should be employed as manager of the company's business, "subject to the satisfaction of the board of directors."

Defendants further alleged in the answer that since said date complainant's services as manager have been unsatisfactory, and that at times he has neglected his duties, so much so that Mandelmann has made complaints of complainant's inattention to them; that during December, 1927, both defendants had repeated conversations with him in regard thereto, but he would not accept suggestions and resented them; that about December 16th, there was a dispute between Lieberman and complainant as regards the manner of conducting the business and at this time the latter struck the former, inflicting a severe bruise; that on December 17th, Greenstone, as president, attempted to discharge complainant as manager, but he refused to cease acting as manager and threatened to strike Greenstone; that since that date all moneys

received from sales at the company's place of business have been retained by complainant personally, and he is now in possession and apparent control of its tangible assets; that on December 21st defendants called a special meeting of the directors to be held at the company's office on December 24, 1927, at 3 o'clock p.m., and at that time when the meeting was about to convene the injunction writ, issued in the present case, was served upon defendants and the company. Defendants denied that either owed the company anything on their stock subscriptions, and alleged that the same had fully been paid for by merchandises delivered to the company from the Greenstone Furniture Co., which latter company they owned and controlled, and that complainant's payments for the capital stock subscribed by him were made by his checks, payable to the order of said Greenstone Co., and, at the time made, were known to him to be in payment of merchandise which became part of the capital assets of the Lu Bell Co. Defendants denied that they had ever attempted to remove any of the furniture or tangible assets of the company from its place of business; denied that they were in any way in financial difficulties; and alleged that their personal credit is good, and that the Greenstone Furniture Co., of which they are the owners, is worth \$200,000, above all liabilities.

If said allegations, as contained in the answer, are in accord with the true facts, which can only be determined after a full hearing of the issues as made by bill and answer, and after examination and cross-examination of witnesses, it is not to be wondered at that defendants, as a majority of the directors of the Lu Bell Co. and owners of a majority of its capital stock, took steps to bring about the discharge of complainant as manager of the company's business, notwithstanding the fact that he, too, was a director and stockholder. They had a right to protect

received from sales of the company's stock of business have been retained by complainant personally, and he is now in possession and apparent control of the tangible assets; that on December 21st, 1927, at 2 o'clock p.m., defendant called a special meeting of the directors to be held at the company's office on December 24, 1927, at 2 o'clock p.m., and at that time when the meeting was about to convene the defendant was present in the presence of the directors and the company. Defendant denied that either owned the company anything or their stock subscriptions, and alleged that the same had fully been paid for by merchandise delivered to the company from the Greenstone Furniture Co., which latter company they owned and controlled, and that complainant's payments for the capital stock subscribed by him were made by his check, payable to the order of said Greenstone Co., and, at the time made, were known to him to be in payment of merchandise which became part of the capital assets of the latter Co. Defendant denied that they had ever attempted to remove any of the tangible or intangible assets of the company from the place of business; denied that they were in any way in financial difficulties; and alleged that their personal credit is good, and that the Greenstone Furniture Co., at which they are the owners, is worth \$200,000, above all liabilities. It was alleged, as contained in the answer, and is accord with the true facts, which can only be determined after a full hearing of the issues as made by bill and answer, and after examination and cross-examination of witnesses, it is not to be wondered at that defendant, as a majority of the directors of the latter Co. and owners of a majority of its capital stock, took steps to bring about the discharge of complainant as manager of the company's business, notwithstanding the fact that he, too, was a director and stockholder. They had a right to proceed

their financial interests in the company by all lawful means. And there is no merit in the contention of complainant's counsel, here made, that the injunction amounts to nothing more than preserving the res. in statu quo, pending a final hearing. The injunction does much more than this, and, if allowed to remain in force and effect, must of necessity cause loss and damage to the stockholders.

For the reasons indicated the injunctive order of December 24, 1927, and the other subsequent orders of the court, keeping it in force and effect until further order, are reversed.

REVERSED.

Barnes, P. J., and Connelley, J., concur.

their financial interests in the matter to all their friends.
The fact is no doubt in the possession of the public's interest,
and that the information is being given to the public.
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and that the information is being given to the public.
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and that the information is being given to the public.

PETER S. JAGLOWSKI,
Appellee,

v.

FRANK CAMPE,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Peter S. Jaglowski, plaintiff, sued Frank Campe and Helen Cummings in the Municipal Court of Chicago, in a tort action. The only defendant served was Frank Campe, and no appearance was entered by the other defendant. The case was tried before the court with a jury and there was a verdict returned finding the defendant Campe guilty and assessing the plaintiff's damages at \$364.55. Judgment was entered on the verdict and this appeal followed. The plaintiff has filed neither an appearance nor a brief in this court.

The claim of the plaintiff was for damages to his automobile alleged to have been caused by the careless and negligent operation of an automobile "owned by the defendant Campe, managed and controlled by his duly authorized agent."

The accident occurred on the afternoon of September 16, 1934, on Sheridan Road, in Evanston, in front of the Northwestern University Gymnasium. The plaintiff was seated in his automobile, which was facing north and was parked on the east side of Sheridan Road in front of the gymnasium. He was waiting for his sister, who had gone into the gymnasium to register. While the plaintiff's car was thus parked, an automobile owned by the defendant Campe and operated by his daughter, Florence Campe, drove up and was parked on the west

REPORT FROM MEMORANDUM
COURT OF CHICAGO

STATE OF ILLINOIS
OFFICE OF THE ATTORNEY GENERAL

CHICAGO, ILLINOIS

February 1, 1934

THE HONORABLE JUSTICE OF THE PEACE OF THE CITY OF CHICAGO

Very respectfully,
This case is assigned to the Municipal Court of Chicago, in a case
numbered. The only defendant named was Frank Camp, and no
appearance was entered by the other defendant. The case was
tried before the court with a jury and there was a verdict
returning finding the defendant Camp guilty and assessing the
plaintiff's damages at \$250.00. Judgment was entered on the
verdict and this appeal followed. The plaintiff has filed
neither an appearance nor a brief in this court.
The claim of the plaintiff was for damages to his
automobile alleged to have been caused by the collision and
negligent operation of an automobile "owned by the defendant
Camp, managed and controlled by his duly authorized agent."
The accident occurred on the afternoon of September
16, 1933, on Madison Road in Chicago, in front of the
Northwestern University Gymnasium. The plaintiff was seated
in his automobile, which was facing north and was parked on
the west side of Madison Road in front of the Gymnasium. He
was waiting for his sister, who had come into the Gymnasium
to register. While the plaintiff's car was thus parked, an
automobile owned by the defendant Camp and operated by his
daughter, Florence Camp, drove up and was parked on the west

side of Sheridan Road. It was headed south and stood about thirty feet south of the automobile of the plaintiff. Florence had left her home to go to the gymnasium to register. On her way, by chance, she met two young girls, Helen Cummings and Margaret Smith, with whom she was acquainted. These girls were not acquainted with the defendant. They got into the automobile merely to take a ride. Neither of them knew how to run a car and neither had at any time prior to the accident in any way operated or driven the car of the defendant. The defendant had not, directly or indirectly, authorized or permitted them to operate his car. When the car was parked Florence "shut down the engine and locked the transmission," and got out of the car and went into the gymnasium to register. She left the two girls in the car. Neither at that time nor at any other time had she in any way authorized or permitted them to operate or drive the car. Florence remained in the gymnasium for one and a half hours and she did not return to the car until after the accident in question. None of the foregoing facts is controverted. The defendant's theory of fact as to what happened thereafter is as follows: That Helen Cummings and Margaret Smith remained seated in the automobile for some time and that they then got out and walked around the block two or three times, and then got into the machine and stayed there until the time of the accident; that as they were seated in the car, a large touring car with a number of young men in it stopped in front of the defendant's car and parked; that the young men attempted to flirt with the two girls but that the latter would not pay any attention to them; that the young men then backed the car in which they were riding and bumped into the defendant's car with such force that it was pushed backwards and across the street, where it hit the plain-

side of Harding Road. It was headed south and about
thirty feet south of the automobile of the plaintiff. Witness
had left her name as to the gymnasium to register. On her
way by chance, she met two young girls, Helen Cummings and
Margaret Smith, with whom she was acquainted. These girls were
not acquainted with the defendant. They got into the automobile
merely to take a ride. Neither of them knew how to run a car
and neither had at any time prior to the accident in any way
operated or driven the car of the defendant. The defendant had
not, directly or indirectly, authorized or permitted them to
operate his car. When the car was parked between "about down the
engine and locked the transmission," and got out of the car and
went into the gymnasium to register. She told the two girls in
the car. Neither at that time nor at any other time had she in
any way authorized or permitted them to operate or drive the car.
Witness remained in the gymnasium for one and a half hours and
she did not return to the car until after the accident in question.
None of the foregoing facts is controverted. The defendant's
theory of fact as to what happened thereafter is as follows:
That Helen Cummings and Margaret Smith remained seated in the
automobile for some time and that they then got out and walked
around the block two or three times, and then got into the
machine and stopped there until the time of the accident; that, as
they were seated in the car, a large crowd of people, some of
of whom were in it occupied in front of the defendant's car and
noticed that the young man attempted to start with the two
girls and that the latter would not pay any attention to them
that the young man then started the car in which they were riding
and bumped into the defendant's car with such force that it was
pushed back into the street, where it hit the plain-

tiff's car and caused the damage for which the suit was brought; that the engine of the car of the defendant was not running at the time and that neither of the two girls did anything to cause the movement of the car; that neither of them knew anything about the parts of an automobile or the manner in which it was operated; that when the young men bumped their car into the automobile of the defendant the shock was so severe that the heads of the two girls in the defendant's machine were bumped with force against the top of the car. The theory of fact of the plaintiff as to the manner of the accident was, that at the time the car of the defendant moved across Sheridan Road from the west to the east side, its engine was running and Miss Cummings had hold of the wheel; that she was backing the car up at the time of the collision; that only Miss Cummings and Miss Smith were in the defendant's car at the time of the accident.

The defendant, in the trial court and here, concedes that his daughter Florence was either a servant or an agent of his when she was operating the automobile.

The undisputed evidence shows that neither Miss Cummings nor Miss Smith was an agent, servant or employee of the defendant Campe, and they had no authority whatever to use the automobile of the defendant at the time and place in question. Therefore, if we assume that the accident was caused by the negligent operation of the machine by Miss Cummings, nevertheless, the defendant Campe would not be responsible, under the law, for such negligence.

(Freeman v. Nixon, 233 Ill. App. 196, and cases therein cited.)

The motion on behalf of the defendant Campe, at the close of the evidence, that a verdict be entered finding him not guilty, should have been allowed by the trial court, and the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

...the car and caused the engine to start...
...the engine of the car of the defendant was not running at
the time and that neither of the two girls did anything to cause
the movement of the car; that neither of them knew anything about
the facts of an automobile or the manner in which it was operated;
that when the young man jumped their car into the automobile of
the defendant the check was so covered that the heads of the two
girls in the defendant's machine were bumped with force against the
top of the car. The theory of fact of the plaintiff as to the
...the machine was, that at the time the car was in the
...the machine was from the road to the east side, the
...and Miss Cummings had hold of the wheel; that
...the machine was in the road to the east side of the
...the machine was in the road to the east side of the
...The defendant, in the trial court and here, contends that
his daughter, Miss Cummings, was either a servant or an agent of his when
she was operating the automobile.
The undisputed facts are that neither Miss Cummings
...agent or employee of the defendant
...they had no authority whatever to use the automobile of
the defendant at the time and place in question. Therefore, it is
...that the accident was caused by the negligent operation of
the machine of Miss Cummings; nevertheless, the defendant's negligence
...under the law, for own negligence.
(Hartman v. Dixon, 233 Ill. App. 100, and cases therein cited.)
The action on behalf of the defendant George, at the time of the
...that a verdict be entered finding the not guilty, should
have been allowed by the trial court, and the judgment of the
Appellate Court of Chicago is reversed.

243 I.A. 653

164 - 32105

FRANCES SCHWARTZ,
Appellant,

v.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

BERNARD W. SNOW,
Bailiff of the Municipal
Court of Chicago,
Appellee.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Frances Schwartz, plaintiff, sued Bernard W. Snow, Bailiff of the Municipal Court of the City of Chicago, in replevin. The defendant filed two pleas, (1) non cepit and (2) that the property was not the property of the plaintiff but the property of one William Reith. The case was tried before the court with a jury, and there was a verdict returned finding the defendant not guilty and the right of possession of the property in question in the defendant, and assessing the defendant's damages at the sum of one dollar. Judgment was entered on the verdict and this appeal followed.

July 1, 1926, Alfred Ludwig obtained a judgment by confession in the Municipal Court of Chicago against William Reith for \$362.50. An execution was issued and the defendant, Bailiff of the Municipal Court, on September 6, 1926, levied upon the goods and chattels described in the plaintiff's declaration, and which were found by the bailiff in the possession of the plaintiff. The theory of fact of the plaintiff was substantially as follows: In December, 1925, the property in question belonged to William Reith, and on December 26, 1925, Sophia Panek obtained a judgment against him in the Municipal

248 I.A. 658

100 - 10100

AMERICAN TRUST COMPANY
COOK COUNTY

FRANCIS SCHWARTZ
Appellant
v.
BERNARD W. SNOW,
Defendant of the Municipal
Court of Chicago,
Appellee.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In the District Court of Cook County, Francis Schwartz, Plaintiff, sued Bernard W. Snow, Defendant of the Municipal Court of the City of Chicago, in respect to the following: The defendant filed two pleas, (1) non suit and (2) that the property was not the property of the plaintiff but the property of one William Keith. The case was tried before the court with a jury, and there was a verdict returned finding the defendant not guilty and the right of possession of the property in question in the defendant, and assessing the defendant's damages at the sum of one dollar. Judgment was entered on the verdict and this appeal followed. July 1, 1935, Alfred Ludwig obtained a judgment by default in the Municipal Court of Chicago against William Keith for \$500.00. An execution was issued and the defendant, Plaintiff of the Municipal Court, on September 4, 1935, levied upon the goods and chattels described in the plaintiff's declaration, and which were taken by the plaintiff in the possession of the plaintiff. The money of part of the plaintiff was substantially as follows: In December, 1935, the property in question belonged to William Keith, and on December 15, 1935, Alfred Ludwig obtained a judgment against him in the Municipal

Court of Chicago in the sum of \$555. December 26, 1925, an execution was issued and a levy made upon the property. Later, a settlement was made between Panek and Reith, and in consideration of the cancelling of the judgment by Panek a chattel mortgage was executed and delivered by Reith to Panek to secure the sum of \$650, evidenced by six notes which were executed by Reith and made payable to Panek. By the terms of the mortgage Reith sold and conveyed to Panek, her heirs and assigns, the goods and chattels in controversy, together with other goods. The chattel mortgage was filed for record January 4, 1926, and on the same day the levy was released. On January 10, 1926, the plaintiff purchased the chattel mortgage from Panek and paid her \$630 therefor, and Panek endorsed the notes and delivered the notes and mortgage to the plaintiff. At this time the property was stored in the Union Warehouse. Reith then declared to the plaintiff that he would be unable to meet the amount due under the mortgage and the plaintiff then reduced the property described in the mortgage to her possession by having it removed from the warehouse to her place of business, and the goods remained in her possession from that time until September 7, 1926, when defendant in the instant case levied upon the property. After the present proceedings were started the plaintiff foreclosed the mortgage, but the mortgage debt was not paid. The goods and chattels in question were used by the plaintiff in her business from the time that she took possession of the same until the levy by the defendant. The plaintiff claims that the legal title in the property was in her under the chattel mortgage, after she reduced the property to her possession, and that she had a valid lien on the property that was legally effective against the judgment of Ludwig. The defendant claimed "that

Court of Chicago in the sum of \$500. December 26, 1928, an execution was taken and a levy made upon the property. Later a settlement was made between Bank and Helsh, and in consideration of the cancelling of the judgment by Bank a chattel mortgage was executed and delivered by Helsh to Bank to secure the sum of \$500. evidenced by six notes which were executed by Helsh and made payable to Bank. By the terms of the mortgage Helsh sold and conveyed to Bank, her heirs and assigns, the goods and chattels in inventory, together with other goods. The chattel mortgage was filed for record January 4, 1929, and on the same day the levy was released. On January 30, 1929, the plaintiff purchased the chattel mortgage from Bank and paid her \$500. Thereafter, the Bank endorsed the notes and delivered the notes and mortgage to the plaintiff. At this time the property was stored in the Union Warehouse. Helsh then advised to the plaintiff that he would be unable to meet the amount due under the mortgage and the plaintiff then returned the property described in the mortgage to her possession. By doing so, it was removed from the warehouse to her place of business, and the goods remained in her possession from that time until September 7, 1929, when defendant in the instant case levied upon the property. After the plaintiff's proceedings were started the plaintiff foreclosed the mortgage, but the mortgage debt was not paid. The goods and chattels in question were used by the plaintiff in her business from the time that she took possession of the same until the levy by the defendant. The plaintiff claims that the legal title to the property was in her under the chattel mortgage, after she released the property to her possession, and that she had a valid lien on the property that was legally effective against the judgment of the court. The defendant claimed "that

the whole scheme by which Keith executed the judgment note, judgment was entered thereon, levy made thereunder, chattel mortgage given Sophie Panek; the levy under said judgment released and delivery made to appellant Schwartz by Keith of the property and by Miss Panek to her of the mortgage and the use of such machinery by appellant for more than a year, without any attempt to foreclose the mortgage was a fraudulent scheme 'cooked up' by Keith to defeat the claim of his creditors, including Strasseberger, from whom such machinery was purchased, and that appellant has failed to sustain the burden of proof cast upon her, as plaintiff in a replevin suit, of sustaining her title." The defendant further contends that the transaction was a "transfer" or "assignment" within the purview of the Bulk Sales Act and that the plaintiff had not complied with the provisions of that Act. Each side introduced evidence in support of its theory, and it was clearly a case in which the jury should have been fairly instructed.

On behalf of the defendant the court gave to the jury twenty-one instructions. The defendant complains that thirteen of these were erroneous and that the giving of each of the thirteen constituted reversible error.

The plaintiff complains of three instructions given at the instance of the defendant, that were predicated upon the "Bulk Sales Act," Ch. 121a, Call. Ill. Stat. Anno. We cite one of these:

"The jury is instructed that should they believe from the evidence that the plaintiff purchased the property from one William Keith without complying with the Bulk Sales Law, in force and effect in the State of Illinois, then the jury must find for the defendant."

The plaintiff contends, first, that she was claiming title to the property in question under a chattel mortgage and that a chattel

mortgage does not come within the provisions of the Bulk Sales Act (Talty v. Bulkheads, 224 Ill. App. 158, 163), and, second, that even if such Act was at all applicable to any theory of fact in the case, the giving of the instruction was erroneous for the reason that the jury were not told in any instruction the text or substance of the Bulk Sales Act, and they were therefore left to determine or guess what the provisions of that Act are and under what state of facts the law would apply. If we assume that there was evidence to warrant the application of the said Act to the case, nevertheless, the second contention of the plaintiff is plainly meritorious. For the same reason it was error to give the other two instructions on the same subject matter.

The plaintiff contends that the court erred in giving the following instruction:

"The jury is instructed that they are entitled to judge the truth or falsity of testimony adduced on the trial of said cause by the demeanor of the witness testifying to same and should the testimony of any witness be proven to be untrue as to any material point, then the jury is entitled to disregard the entire testimony of that witness except where said testimony is corroborated by other reputable witnesses."

The conduct and demeanor of a witness on the stand is only one of the tests that a jury may apply in determining the credibility of a witness. The jury may also take into consideration the interest of the witness, if any, in the result of the trial; the probability or the improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to matters respecting which the witness gave testimony; the fact that he or she has been corroborated or contradicted by other credible evidence or by facts and circumstances in evidence, etc. The instruction is also erroneous wherein it states that should the testimony of any witness be proven to be untrue as to any material point, then the jury is entitled to disregard the entire testimony

of the witness, etc., as it omits the very material qualification that the false testimony shall have been wilful. (See Hoge v. The People, 117 Ill. 35; see also Chicago City Ry. Co. v. Ollis, 192 Ill. 514.) The instruction is also erroneous in omitting from the concluding part the material qualification that testimony may be corroborated by facts and circumstances proved on the trial. Also where the instruction reads "reputable witnesses," it should have read "credible witnesses." Instruction number sixteen, given at the instance of the defense, contains the same vices that are found in the last instruction.

The plaintiff complains of the following instruction given at the instance of the defendant:

"The court instructs the jury that should the jury believe that no valid consideration was given for the execution of the chattel mortgage in question or, in other words, that no moneys or other properties were paid to William Keith by Sophia Panek for the mortgage in question, then and in that event the jury are entitled to disregard the mortgage."

As the evidence for the plaintiff tended to prove that the consideration for the chattel mortgage was the cancelling by Panek of a judgment she held against Keith, the instruction was plainly erroneous and misleading.

The plaintiff complains that the court erred in giving the following instruction:

"The court instructs the jury that should the jury believe from the evidence that the plaintiff conspired with one William Keith and Sophia Panek to execute a fraudulent chattel mortgage for the purpose of defeating creditors of claims against the property in question then and in that event the plaintiff is not entitled to recover and a finding should be made for the defendant."

This instruction was erroneous, as it precluded a recovery by the plaintiff if the jury believed that the plaintiff merely conspired with Keith and Panek to execute a fraudulent chattel mortgage, etc.,

of the witness etc., as it is the very material qualification
that the witness should have been with. (See Hart v.
the People, 117 Ill. 38) see also Chicago City Ry. Co. v. Olin
102 Ill. 314. The instruction is also erroneous in omitting
from the concluding part the material qualification that testimony
may be corroborated by facts and circumstances proved on the trial.
Also where the instruction reads "reputable witnesses", it should
have read "credible witnesses". Instruction number sixteen, given
of the instance of the defense, contains the same error that are
found in the last instruction.

The plaintiff complains of the following instruction
given at the instance of the defendant:

"The court instructs the jury that should the
jury believe that no valid consideration was given
for the execution of the mortgage in question
or, as given words, that no money or other thing of
value was paid to William Keith by Joseph Frank for the
mortgage in question, then and in that event the jury
will be directed to disregard the mortgage."

As the evidence for the plaintiff tended to prove that the con-
sideration for the chattel mortgage was the cancellation by Frank
of a judgment she held against Keith, the instruction was plainly
erroneous and misleading.

The plaintiff complains that the court erred in giving
the following instruction:

"The court instructs the jury that should the
jury believe from the evidence that the plaintiff
conspired with one William Keith and Joseph Frank
to execute a fraudulent chattel mortgage for the
purpose of obtaining judgment of circuit against
the party in question then and in that event
the plaintiff is not entitled to recover and a
verdict should be made for the defendant."

This instruction was erroneous, as it presented a recovery of the
plaintiff if the jury believed that the plaintiff merely conspired
with Keith and Frank to execute a fraudulent chattel mortgage, etc.,

although the said parties may have done nothing in furtherance of the said conspiracy.

The plaintiff justly complains of other instructions given to the jury at the instance of the defendant, but we do not deem it necessary in the determination of this case to refer specifically to them. The counsel for the defendant have not attempted to justify any of these instructions, but they content themselves with the assertion that "no matter how many times this case is tried, the jury cannot help, under the facts, to find for the appellee." While we cannot concede the statement as to the effect of the evidence, we feel impelled to say that if the counsel are sincere in their belief, that it would be wise policy for them to more carefully consider the set of instructions that they tender to the court in the next trial of the cause.

We do not consider it necessary to refer to certain other points raised by the plaintiff. The judgment of the Circuit Court of Cook County should be and it is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Bridley, J., concur.

although the said parties may have been holding in testimony of the conspiracy.

The plaintiff's counsel has also stated that the jury is given as the jury of the instance of the defendant, but we do not deem it necessary in the determination of this case to refer specifically to them. The counsel for the defendant have not attempted to justify any of these instructions, but they content themselves with the assertion that "no matter how many times this case is tried, the jury cannot help, under the facts, to find for the appellee." While we cannot concede the statement as to the effect of the evidence, we feel impelled to say that if the evidence are taken into their belief, that it would be also proper for them to have carefully considered the rest of instructions that they found in the court in the first trial of this case.

It is not necessary to refer to certain points raised by the plaintiff. The judgment of the circuit court is hereby affirmed and it is reversed and the cause is remanded.

James, P. J., and Wright, J., concur.

JENNIE HORWITZ,
Appellant,
v.
CASCADE LAUNDRY COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SWANLAN DELIVERED THE OPINION OF THE COURT.

Jennie Horwitz, plaintiff, sued the Cascade Laundry Company, a corporation, defendant, in the Superior Court of Cook County, in case. The suit was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff when she was struck by a motor truck belonging to the defendant. The plaintiff's declaration consisted of three counts, one of which charged wilful and wanton negligence. The case ^{was} tried before the court with a jury. At the conclusion of all the evidence the defendant moved the court to instruct the jury that there was no evidence to sustain the charge of wilful and wanton negligence, and to disregard the count of the declaration charging the same. Over the objection of the plaintiff this instruction was given to the jury. The case went to the jury on the other two counts, and a verdict was returned finding the defendant not guilty. Judgment was entered on the verdict and this appeal followed.

The sole question urged by the plaintiff is that the trial court committed reversible error in instructing the jury that there was no evidence tending to prove wilful and wanton negligence, and to disregard the count charging the same. There is evidence in the record tending to support the

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APPEAL FROM SUPERIOR COURT COOK COUNTY

JENNIE MORRIS, Plaintiff,
vs.
GASPAR LAUNDRY COMPANY, Defendant,
a corporation.

THE JUDGE OF THE COURT HAS GIVEN THE OPINION OF THE COURT.

Jennie Morris, Plaintiff, sued the Gaspar Laundry Company, a corporation, Defendant, in the Superior Court of Cook County, Illinois. The suit was brought to recover damages for personal injuries alleged to have been sustained by the Plaintiff when she was struck by a water tank belonging to the Defendant. The Plaintiff's declaration consisted of three counts, the first of which charged that on or about the 1st day of June, 1914, at Chicago, Illinois, the Defendant's water tank, while in the act of discharging its contents, struck and injured the Plaintiff, and that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The second count charged that the Defendant's water tank, while in the act of discharging its contents, struck and injured the Plaintiff, and that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The third count charged that the Defendant's water tank, while in the act of discharging its contents, struck and injured the Plaintiff, and that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The Court found in favor of the Plaintiff on all three counts, and entered judgment accordingly. The Plaintiff appeals from the judgment of the Court on the third count, and asks that the same be reversed. The Court finds that there was no evidence tending to prove that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The Court therefore reverses the judgment of the Court on the third count, and enters judgment in favor of the Defendant on that count. The Court finds that there was no evidence tending to prove that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The Court therefore reverses the judgment of the Court on the third count, and enters judgment in favor of the Defendant on that count. The Court finds that there was no evidence tending to prove that the Defendant was negligent in so doing, and that the Plaintiff was damaged thereby, and that she is entitled to recover damages therefor. The Court therefore reverses the judgment of the Court on the third count, and enters judgment in favor of the Defendant on that count.

following theory of fact: The plaintiff conducted a hardware store located on the east side of Racine avenue and about twenty-five feet south of the southeast corner. There are street car tracks on Racine avenue and the pavement was in a bad condition. About the noon hour plaintiff walked across Racine avenue to the west side of the street and made some purchases in a grocery store located near the southwest corner of Racine avenue and Seventy-first street and after she made certain purchases she walked to the edge of the sidewalk on the west side of Racine avenue. There the plaintiff stopped and looked up and down the street. There was no north or south bound traffic on the street. To the south the plaintiff saw an auto truck that was about a block away that was north bound in the north bound street car tracks. Plaintiff then started across the street near the street intersection and when she reached the street car tracks she saw that the truck was then a half block away. She proceeded across the street and when she was just about across the street car tracks she noticed that the truck was then about the width of three stores away from her and she then hastened her steps. The driver of the auto truck saw the plaintiff when she left the grocery store, saw her standing at the west curb, and watched her crossing the street. He saw no vehicles or people on the street and there was nothing to interfere with his view. He made no attempt to change his speed until he was about four or five feet away from the plaintiff, who was then in front of the truck. He then made a loud noise by sounding his horn twice, at which the plaintiff threw both her arms into the air and made an effort to escape the auto, but it "ran her down." The driver, when he sounded the horn, turned the truck to the right and ran into the curb on the south side of the street with such force that

Following heavy of foot: The plaintiff remarked a hardware store located on the east side of Madison Avenue and about twenty-five feet south of the southeast corner. There are several car tracks on Madison Avenue and the pavement was in a good condition. About the noon hour plaintiff walked across Madison Avenue to the west side of the street and made some purchases in a grocery store located near the southeast corner of Madison Avenue and Twenty-fifth Street and after she made certain purchases she walked to the edge of the sidewalk on the west side of Madison Avenue. There the plaintiff stopped and looked up and down the street. There was no horse or cart bound traffic on the street. To the south the plaintiff saw on Madison Avenue that was about a block away that was north bound in the south bound street car tracks. Plaintiff then started across the street near the street intersection and when she reached the street car tracks she saw that the truck was then a half block away. She proceeded across the street and when she was half about across the street car tracks she noticed that the truck was then about the width of three stories away from her and she then stopped. The driver of the auto truck saw the plaintiff when she left the grocery store, saw her standing at the west curb and watched her crossing the street. He saw no vehicles or people on the street and there was nothing to interfere with his view. He made no attempt to change his speed until he was about four or five feet away from the plaintiff, who was then in front of the truck. He then made a loud noise by sounding his horn twice, at which the plaintiff threw both her arms into the air and made an effort to escape the auto, but it ran her down. The driver, when he sounded the horn, turned the truck to the right and ran into the curb on the south side of the street with such force that

the right front wheel of the truck was broken off, and when the truck came to a stop it was partly on the sidewalk. At the place where the truck struck the curb a piece of the curb thirty to thirty-six inches long and about four or five inches deep was broken off. When the truck stopped the plaintiff was found lying near the rear left wheel of the truck with her dress caught between the tire and the pavement. She was unconscious. The storekeeper in the place just south of the plaintiff's store testified that he had used automobiles for eight years and that he was able to tell the speed at which an auto was traveling, and that the truck at the time of the accident was running between twenty and twenty-two miles an hour. There was also evidence to the effect that the place of the accident was a business neighborhood.

We think it perfectly clear from the foregoing that there is evidence in the record "fairly tending to show such a gross want of care as indicates a wilful disregard of consequences, or a willingness to inflict injury," and therefore it was a question to be determined by the jury whether the negligent conduct of the defendant's servant amounted to wantonness or wilfulness. (Bremer v. L. E. & W. R. R. Co., 313 Ill. 11, 20. See also two recent decisions of this branch of the appellate Court, Leverenz, Admr., v. La Rosa, Gen. No. 31268, and Gorman, Admr. v. Sucherman, Gen. No. 32046.)

The trial court therefore erred in giving to the jury the instruction in question, and the judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

the right front wheel of the truck was broken off, and when the truck came to a stop it was partly on the sidewalk. At the place where the truck struck the curb a piece of the curb thirty to thirty-six inches long and about four or five inches deep was broken off. When the truck stopped the plaintiff was found lying near the rear left wheel of the truck with her arms caught between the tire and the pavement. She was unconscious. The coroner in the place just north of the plaintiff's store testified that he had seen a woman for eight years and that he was able to tell the speed at which an auto was traveling, and that the truck at the time of the accident was running between twenty and twenty-five miles an hour. There was also evidence to the effect that the place of the accident was a business neighborhood.

We think it perfectly clear from the foregoing that there is evidence in the record "fairly tending to show each a gross want of care on the part of the defendant and that the plaintiff was injured by the negligence of the defendant." and therefore it was a question to be determined by the jury whether the negligence of the defendant's servant amounted to wantonness or willfulness. (Brown v. E. & W. R. Co., 218 Ill. 11, 30. See also two recent decisions of this branch of the appellate court, Levy v. E. & W. R. Co., 218 Ill. 11, 30. and Levy v. E. & W. R. Co., 218 Ill. 11, 30.)

The trial court therefore erred in giving to the jury the instruction in question, and the judgment of the court is reversed. The case is remanded.

HARMON, P. J., and GRADY, J., concur.

MRS. BLANCHE WOODWARD,
Appellee,

v.

AMERICAN MUTUAL INDEMNITY
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Blanche Woodward, sued the defendant, American Mutual Indemnity Company, a corporation, in the Municipal Court of Chicago, in an action on contract. The case was tried before the court with a jury. There was a verdict finding the issues against the defendant and assessing the plaintiff's damages at the sum of \$785. Judgment was entered on the verdict and this appeal followed.

The plaintiff's statement of claim is as follows: "Plaintiff alleges: That on or about July 15th A. D. 1923, there was stolen from plaintiff a 1921 Cadillac touring automobile in Chicago, Cook County, Illinois, which defendant then and there insured against theft under said defendant's Certificate No. 3656-204 for \$700.00, and plaintiff's claim is for said amount of insurance and interest thereon from the date of the loss of said car." The defendant's affidavit of merits contained (inter alia) the following: "Affiant denies that the defendant is indebted to the plaintiff in the sum of \$1,000.00 or any other sum."

The defendant has argued a number of points in support of its contention that the judgment should be reversed, but in

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ATLAS NEWS SERVICE
CHICAGO, ILLINOIS

ATLAS NEWS SERVICE
CHICAGO, ILLINOIS
A CORPORATION
INCORPORATED IN ILLINOIS

THE JURY VERDICT WAS DELIVERED THE OPINION OF THE COURT.

The plaintiff, Atlantic News Service, used the defendant, American Mutual Insurance Company, a corporation, in the Municipal Court of Chicago, in an action on contract. The case was tried before the court with a jury. There was a verdict finding the insurance against the defendant and assessing the plaintiff's damages at the sum of \$700. Judgment was entered on the verdict and this appeal followed.

The plaintiff's statement of claim is as follows: "Plaintiff alleges that on or about July 1st A. D. 1933, there was stolen from plaintiff a 1931 Cadillac touring automobile in Chicago, Cook County, Illinois, which defendant then and there located against their stolen goods defendant's certificate No. 3333-334 for \$700.00, and plaintiff's claim is for said amount of insurance and interest thereon from the date of the loss of said car." The defendant's answer to the complaint contains the following: "Plaintiff denies that the defendant is indebted to the plaintiff in the sum of \$1,000.00 or any

amount less than \$1,000.00. The defendant has signed a number of papers in support of its contention that the judgment should be reversed, and in

the view that we have taken of the case it will be only necessary for us to refer to two of them.

The defendant placed on the stand an expert as to values of automobiles to testify as to the fair market value of the car at the time in question and in the condition as testified to by the plaintiff, but the court, on objection by the plaintiff, refused to permit this witness to testify on that subject, on the ground, as stated by the court, that "there was no issue raised in the pleadings. The affidavit does not raise that. It is admitted that the value is the amount indicated in the statement of claim." While it was incumbent on the plaintiff to prove the fair market value of the car as a part of her case, nevertheless, she does not allege in her statement of claim what that value was, and therefore there was no allegation as to value for the defendant to deny, and the language in the affidavit of merits that "affiant denies that the defendant is indebted to the plaintiff in the sum of \$1,000.00 or any other sum," clearly placed in issue (inter alia) the question of the value of the car. Under the ordinary rules of pleadings there was certainly nothing in the defendant's affidavit of merits that could be construed as an admission as to the value of the car, and, under Rule 15 (k) of the Municipal Court, a defendant is not obliged to deny specifically or by implication allegations of unliquidated damages. Rule 15 (k) reads as follows: "Every allegation of fact in any pleading, except allegations of unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted, except as provided by Rule 19." In our judgment, under the pleadings, the defendant should have been allowed to prove by the witness the fair market value of the machine in question.

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for us to refer to two of them.

The defendant placed on the stand an expert in the

values of automobiles to testify as to the fair market value of

the car at the time in question and in the condition as testified

to by the plaintiff, but the court, on objection by the plaintiff,

refused to permit this witness to testify on that subject, on the

ground, as stated by the court, that "there was no issue raised

in the pleadings. The defendant does not raise that. It is

admitted that the value is the amount indicated in the testimony

of claim." This is now introduced on the plaintiff to prove the

fair market value of the car on a part of her case, nevertheless,

she was not allowed to introduce this testimony of claim which was

and character there was no objection as to value for the purpose

and to carry, and the language in the affidavit of service that

"plaintiff claims that the defendant is indebted to the plaintiff

in the sum of \$1,000.00 or any other sum," clearly leaves it in

(later also) the question of the value of the car. Under the

affidavit rules of pleading there was certainly nothing in the

plaintiff's affidavit of service that could be considered as an

objection as to the value of the car, and, under Rule 13 (b) of

the Federal Court, a defendant is not obliged to deny specifically

or by implication allegations of undischarged damages. Rule 13

(b) reads as follows: "Every allegation of fact in any pleading,

except allegations of undischarged damages, if not denied

specifically or by necessary implication in the pleading of the

opposite party, shall be taken to be admitted, except as provided

by Rule 13." In our judgment, under the pleadings, the defendant

should have been allowed to prove by the witness the fair market

value of the machine in question.

The only evidence introduced by the plaintiff to prove the fair market value of the automobile on the date of the loss was given by the plaintiff and was as follows: "I should consider the car cheap at \$800." The defendants objected to this testimony and moved to strike the same, but the court overruled the objection and denied the motion to strike. As we have heretofore said, it was incumbent on the plaintiff to prove the fair market value of the automobile on the date of the alleged theft, and the statement by the plaintiff that she "should consider the car cheap at \$800" was certainly not competent evidence tending to prove the fair market value of the car, when objection was made to the proof offered. The court erred in allowing this evidence to stand. We note in this connection that there was no evidence introduced that tended in any way to qualify the plaintiff as an expert as to values of automobiles. The jury allowed the maximum amount of the insurance certificate.

For the reasons indicated, the judgment of the Municipal Court of Chicago will be reversed and the cause will be remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

The only evidence introduced by the plaintiff to prove the fair market value of the automobile at the date of

the loss was given by the plaintiff and was as follows: "I should consider the car cheap at \$800." The defendant

objected to this testimony and moved to exclude the same, but the court overruled the objection and asked the witness to

state. As we have previously said, it was incumbent on the plaintiff to prove the fair market value of the automobile on

the date of the alleged theft, and the statement by the plaintiff that the "should consider the car cheap at \$800" was

admittedly not evidence tending to prove the fair market value of the car, with objection was made to its admission.

Thereafter, the court asked in allowing this evidence to stand. It was in this connection that there was the following statement:

"I am sure in my own mind that the value of the car at the time of the theft was at least \$800. I am sure of this."

of the competent evidence.

But the record indicates, the judgment of the court in this case will be reversed and the cause will be remanded.

REVEREND AND HONORABLE

Very truly yours,

FLORENCE BOWMAN,
Appellee,

v.

ILLINOIS CENTRAL RAILROAD
COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Florence Bowman, plaintiff, sued the Illinois Central Railroad Company, a corporation, in the Circuit Court of Cook County in an action in case. In a trial before the court with a jury there was a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$10,000. Judgment was entered on the verdict and this appeal followed.

The plaintiff was thirty-six years of age at the time of the accident, and married, and was a maid or attendant in the service of the Pullman Company. She worked for that Company as a maid on the Century Limited train of the New York Central and in October, 1925, she was assigned to duty on the Florida trains of the defendant, and at the time of the accident she was in service on the Seminole Limited, a fast train of the defendant that ran between Chicago and Jacksonville, Florida. On April 25, 1926, about 2 o'clock p. m., this train, south bound, when in the neighborhood of Jasper, Alabama, and running at the rate of thirty-five or forty miles per hour, had a head-on collision with a north-bound Seminole Limited train. The speed of the latter train is not given in the proof but the force of the collision was such that it caused "a very bad wreck." Both engines were tipped on their sides and the engine on the north-bound train

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,
vs.
THE CENTURY LIMITED,
Defendant in Error.

THE COURT OF APPEALS OF THE STATE OF ILLINOIS.

Witnesses, Plaintiff, under the Illinois Statute,
The Century Limited, a corporation, in the Circuit Court of Cook
County, in an action in error. In a trial before the court with
a jury there was a verdict returned finding the defendant guilty
and awarding the plaintiff damages of \$100,000.
The plaintiff was thirty-six years of age at the time
of the accident, and married, and was a maid or attendant in
the service of the Century Limited. She worked for that Company
as a maid on the Century Limited train of the New York Central
and was in October, 1905, she was assigned to duty on the Florida
system of the defendant, and at the time of the accident she was
in service on the Florida Limited, a fast train of the defendant
that ran between Chicago and Jacksonville, Florida. On April 25,
1906, about 3 o'clock p. m., said train, north bound, when in the
vicinity of Jasper, Alabama, and running at the rate of
thirty-five or forty miles per hour, had a head-on collision with
a north-bound Florida Limited train. The speed of the latter
train is not given in the report but the force of the collision
was such that it caused "a very bad wreck." Both engines were
sipped on their sides and the engine on the north-bound train

"had gone about six feet into the south-bound engine and the second baggage car (on the south-bound train) had telescoped the third baggage car to within six or seven feet of the end. * * The second baggage car had hopped up on to the platform of the third baggage car and crushed right through it, demolishing everything, throwing the baggage outside and completely wrecking the third car." The evidence does not show how many of the cars on the two trains were wrecked, but it appears in proof that the engines and baggage cars of the two trains and the observation car on the south-bound train were so badly damaged that they were left at the place of the accident. Thirty or forty persons, at least, were injured, some of them severely, and it would appear that one of the engineers was killed. Six or eight doctors were called to the wreck and two and a half or three hours after the collision ambulances were still removing the injured.

The only contention of the defendant on this appeal is thus stated in its brief: "The exact issue, and only issue, presented in the court below, and now presented in this court, is whether or not the diseased condition of the womb and left Fallopian tube, discovered by Dr. Butler on July 20, 1926, * * and which were removed by Dr. Culbertson on July 23, 1926, was shown by the evidence to have been a proximate result of the injuries sustained in the train collision. The other injuries shown by the evidence to have been sustained by the plaintiff resulted in only temporary disability and were comparatively trivial."

On July 23, 1926, Dr. Carey Culbertson, assisted by Dr. Butler, performed an operation upon the plaintiff that consisted in the removal of the womb and the left Fallopian tube. The plaintiff claims that the conditions that made this operation necessary were proximately caused by the accident in question. The defendant contends to the contrary and insists that "the

"and from about six feet from the south-bound engine and the second
passenger car (on the south-bound train) and dismissed the third
passenger car to within six or seven feet of the end." The second
passenger car had stopped up on to the platform of the third passenger
car and grounded right through it, demolishing everything, throwing
the baggage outside and completely wrecking the third car." The
evidence does not show how many of the cars on the two trains were
wrecked, but it appears in great detail that the engine and baggage cars
of the two trains and the observation car on the north-bound train
were so badly damaged that they were left at the place of the
accident. Thirty or forty persons, at least, were injured, some
at once severely, and it would appear that one of the engineers
was killed. Six or eight doctors were called to the wreck and
two and a half or three hours after the collision ambulances were
called to remove the injured.

The only contention of the defendant on this point is
that stated in its brief: "The exact issue, and only issue,
presented in the court below, and now presented in this court, is
whether or not the damaged condition of the ramp and left
tailpipe tube, discovered by Dr. Butler on July 20, 1926, and
which were removed by Dr. Underwood on July 28, 1926, was
shown by the evidence to have been a proximate result of the
collision sustained in the train collision. The other injuries
shown by the evidence to have been sustained by the plaintiff
resulted in only temporary disability and were comparatively trifling.

On July 28, 1926, Dr. Percy Underwood, assisted by
Dr. Butler, performed an operation upon the plaintiff that
consisted in the removal of the ramp and the left tailpipe tube.
The plaintiff claims that the condition that made this operation
necessary was proximately caused by the accident in question.

The defendant contends to the contrary and insists that "the

infected condition of the womb and tube which necessitated this operation on July 28th, was a direct result of the old female disease found to exist when the operation was performed in 1922, when her appendix and right tube were removed."

Dr. Henry Scott, apparently a surgeon of long experience and a specialist in abdominal surgery and diseases of women, is the only one who testified as to the first operation. From his evidence it appears that he examined the plaintiff in 1913 and determined that she had had an attack of appendicitis and that he advised an operation, but that she would not consent to the same; that in 1922 she had a similar attack and he then made an examination of her abdomen and pelvic organs to ascertain if she had any venereal disease; that he took a smear or secretion from the genital organs and examined it microscopically, and it did not show any sign of such disease; that a laboratory examination of the urine showed nothing, and a Wasserman test was negative; that at the time of the operation he found chronic appendicitis and the right Fallopian tube closed; that the latter condition indicated that some inflammation had closed the end of the tube and the inflammation there, most probably, came from the appendix - from her attacks of appendicitis. He removed the appendix and the tube. "Q. And at that time was there any infection, anything on the other genital organs, anywhere, that you found? A. Absolutely not, no. I examined all of them. She got along fine after the operation and left the hospital twelve days thereafter." No evidence was offered in contradiction of this testimony. The plaintiff testified that from the time of the operation in 1922 until the time of the accident she was in good health, "felt well and worked, had always been very active;" that in addition to her work on the train she had customers at both ends of the trip for

indicated condition in the womb and also which necessitated this operation on July 28th, was a direct result of the old disease. It was found to exist when the operation was performed in 1922. When the appendix and right tube were removed.

Dr. Henry Scott, apparently a surgeon of long experience and a specialist in abdominal surgery and disease of women, is the only one who testified as to the first operation. From his evidence it appears that he examined the plaintiff in 1913 and determined that she had an attack of appendicitis and that he advised an operation, but that she would not consent to the same. That in 1922 she had a similar attack and he then made an examination of her abdomen and pelvic organs to ascertain if she had any present disease; that he took a tumor of operation. That the genital organs and examined is microscopically, and it did not show any sign of such disease; that a laboratory examination of the urine showed nothing, and a bacterium test was negative; that at the time of the operation he found chronic appendicitis and the right fallopian tube closed; that the latter condition indicated that some inflammation had closed the end of the tube and the inflammation there, most probably, came from the appendix. He removed the appendix and from her attack of appendicitis. He removed the appendix and the tube. "At that time we found any infection, nothing to the left genital organs. At that time we found a - 10 -

plaintiff was not. I retained all of them. The day after the operation and left the hospital twelve days thereafter." No evidence was offered in contradiction of this testimony. The plaintiff testified that from the time of the operation in 1922 until the time of the accident she was in good health, "I felt well and strong, but always been very nervous" that in addition to her work on the train she had undertaken at both ends of the trip for

whom she did maniauring and marcelling; that from the time she commenced work on the Florida service of the defendant company in October, 1926, she "never missed a trip." The foregoing testimony of the plaintiff is not controverted.

The plaintiff testified that at the time of the collision she was seated on the edge of a seat in a section of the Pullman car; that there was a roaring and an impact; that "when the impact came I was thrown forward with a rebound back and down. I was thrown forward against the arm of the Pullman seat in front of me * * my abdomen struck the arm about the center of the abdomen. * * I was struck back of the left ear and it left a scar right behind my ear. I went down to the floor and the cushions from the seats were thrown on me; * * * the wind was knocked out of me when I was thrown against the arm of the chair;" that she was dazed. The plaintiff further testified that after the collision, in the excitement, she was not thinking of herself and that for about two and a half hours she assisted the conductor, at his request, in waiting on injured passengers and railroad employees; that during all this time she was in great pain and at times had to sit down; that she "limped along" as she walked; that her abdomen and ankle were swelling and her stomach was sore; that she could not stand very erect and that she had pains in her abdomen; that about an hour and a half after the accident she noticed that she was bleeding from the vagina; that when all the injured people had been taken care of and the last ambulances had gone she found herself exhausted and "the conductor put me to bed in a drawing room and a passenger - I put iodine to my ankle and he gave me the bottle to put it to my side. The doctors left tablets for me to take, four little white tablets they had previous to this given me, and liquid medicine;" that the doctors examined her stomach and gave her medicine and

When the witness was asked to state from the time the
witness was on the witness stand at the defendant's company
in October, 1935, the witness stated a "trip". The foregoing
statement of the witness is not contradictory.

The witness testified that at the time of the collision
she was seated on the edge of a seat in a number of the witness
and that there was a warning and an impact; that when the impact
came I was thrown forward with a rebound back and down. I was
thrown forward against the air of the witness seat in front of me
and my abdomen struck the seat about the center of the abdomen.
I was struck back of the left ear and it felt a very slight
upward. I went down to the floor and the witness from the seat
was thrown on me; the wind was blowing out of me when I was
thrown and that the car of the witness, that she was thrown. The

witness testified that when the collision, in the
statement, she was not thinking of herself and that for about two
and a half hours she needed the doctor, at his request, in
relation to injured passengers and witnesses (witnesses) that during
all this time she was in great pain and at times had to sit down;
that the witness along as the witness that her stomach was swollen
and swollen and her stomach was very hot and could not stand
very erect and that she was in her stomach; that about 10
hours and a half after the accident she noticed that she was short-
leg from the vagina; that when all the injured people had been taken
care of and the last ambulance had gone she found herself exhausted
and the doctor put me to bed in a dining room and a hot
I was taken to my car and he gave me the bottle to put it to my
side. The doctor told witness for me to take, four little white
pills, they had given me, and I should swallow them.
That the doctor examined her stomach and gave her medicine and

she then noticed "a bulging, inflamed spot" at the point on the stomach where the arm of the seat struck; that while in the berth she had an "awful pain" in her stomach and ankle, and a terrible roaring in her ear; that the injured place in the stomach was immediately to the right of the navel; that some time in the morning the conductor of the train flagged a north-bound train "in the woods" and two of the porters made a seat with their hands and arms and carried her to the latter train, where with the assistance of the maid of that train she was placed in bed, and remained there until the train arrived in Chicago; that then the Pullman maid helped her to dress and the Pullman conductor had her wheeled to a Yellow cab, and one of the dining car waiters accompanied her to her home and assisted her into the house, where she was placed in bed. Laura Stockton, a graduate nurse, testified that she was a passenger on the south-bound train at the time of the accident; that there was a card table in front of her; that she was leaning back on the seat and looking out of the window when there came a sudden jolt and she was thrown violently forward; that almost instantly there came a second jolt and she found herself on the floor of the car, partly under the table, and partly under the seat ahead of her; that shortly after the accident the plaintiff helped to put her in a berth; that the plaintiff at the time was white and trembling and holding her side; that shortly thereafter the witness asked the plaintiff for a bed pan, and while the plaintiff was assisting her in connection therewith the plaintiff sat on the edge of the bed, and when she arose there was a bloody spot on the sheet where the plaintiff had sat; that the plaintiff, as she moved about the car at different times, "supported herself by the arms of the chairs, as she went by, and she still held her side, and she limped." This witness was removed from the train in an

the train stopped "a distance" of about 100 feet. At the time on the
stomach where the arm of the coat was; that while in the berth
she had a "bad fall" in her stomach and while, and a car-
riage in her car; that the injured place in the stomach was
immediately to the right of the navel; that some time in the
morning the conductor of the train stopped a north-bound train
"in the woods" and two of the porters made a seat with their
hands and arms and carried her to the lower berth, where with
the assistance of the maid of that train she was placed in bed,
and remained there until the train arrived in Chicago; that then
the train maid helped her to dress and the Pullman conductor
had her wheeled to a Pullman car, and one of the dining car waiters
accompanied her to her room and assisted her into the room, where
she was placed in bed. Laura Jackson, a graduate nurse, testified
that she was a witness to the above events at the time of
the accident; that there was a head cable in front of her; that
she was leaning back on the seat and looking out of the window when
there came a sudden jolt and she was thrown violently forward; that
almost instantly there came a second jolt and she found herself on
the floor of the car, partly under the table, and partly under the
seat ahead of her; that shortly after she noticed the girl, all
helped to put her in a berth; that the girl, at the time was
white and trembling and holding her side; that shortly thereafter
the witness asked the girl, "Is a doctor called?" and while the girl
still was assisting her in connection therewith the witness saw
on the edge of the bed, and when she rose there was a bloody spot
on the sheet where the girl had sat; that the girl, as
she moved about the car at different times, "expressed herself by
the name of the train, as she went by, and she still held her side,
and the injured." This witness was removed from the train in an

ambulance and never saw the plaintiff again until the time of the trial. Joseph F. Macdrell, working for the A. W. Shaw Company, publishers, in Chicago, testified that he was a passenger on the south-bound train and was in the last seat of the observation car; that there came a sudden jerk of the train and he was thrown on his left side and to the floor; that he then stood up and there came a second and more violent jerk and he was thrown forward about fifteen feet and against the front of the car; that he hurt both of his wrists when he put his hands out to protect himself as he struck the end of the compartment; that when he struck the end he was thrown backward but kept his feet. This witness testified that for about two hours after the collision and until he was taken away in an ambulance, he noticed the plaintiff as she moved about and aided the passengers; that as she walked "she had a very bent figure, with either her left or her right hand holding to her stomach;" that at all times as she moved about she was bent over; that he returned to the train about 10 or 10:30 p.m. and found the plaintiff in bed in a compartment; that her ankle or leg was swollen and he put some iodine on it.

The plaintiff reached her home on April 27, 1926. Her abdomen "was terribly swollen" and she was suffering from trouble in her left ear. Her right ankle was swollen and had turned black and blue. The vaginal flow of blood continued for thirty-one days and after that time there was an intermittent flow until the time of the operation on July 28th. Until the operation she could not retain solid food, she suffered from nausea and she had no natural bowel movements. On the day the plaintiff arrived home Dr. Holloway was called to attend her. He found that she had contusions on the shoulder and back and on the whole side, and an enlarged abdomen, swollen some, and an enlargement about the size of a hen's egg or a little larger, just to the right of the median line, just below

ambulance and never saw the plaintiff again until the time of
the trial. Joseph E. MacFarland, working for the A. W. Shaw Company,
Chicago, testified that he was a passenger on the
north-bound train and was in the last coach of the passenger car;
that there were a number of men in the train and he was thrown on his
left side and to the floor; that he then stood up and there were a
number of men violent jerk and he was thrown forward about fifteen
feet and against the frame of the car; that he hurt back of his
cervical when he put his hands out to prevent himself as he struck
the end of the compartment; that when he struck the end he was thrown
backward but kept his head. This witness testified that for about
two years after the collision and until he was taken away in an
ambulance, he noticed the plaintiff as she moved about and acted
in a nervous way; that he saw her "she had a very pale face."
with either her left or her right hand holding to her stomach;
that at all times as she moved about she was bent over; that he
returned to the train about 10 or 12:30 p.m. and found the plaintiff
left in bed in a compartment; that her whole face was swollen
and he put some ice on it.
The plaintiff's mother, Mrs. Mary MacFarland, testified that
she was "very nervous" and she was suffering from "nervous
in her left ear." Her right ear was swollen and had turned black
and blue. The witness then at about mentioned the plaintiff's body
and after that time there was an intermittent flow until the time
of the operation on July 22nd. Until the operation the swelling and
redness were less, and continued from morning and she had no further
further movements. On the day the plaintiff arrived home to, Railway
was called to second floor. He found that she had continued on the
stomach and back and on the whole side, and an enlarged abdomen,
swollen face, and an enlargement about the size of a hen's egg or
a little larger. Just to the right of the swollen face, just below

the umbilicus; that this enlargement pained her very much; that she had developed peritonitis from the contusion and "I treated her for that probably two or three weeks," and that then the enlargement gave her so much trouble that he had an abdominal bandage fitted to reduce the enlargement; that he diagnosed it as a ventral hernia and it was necessary at times to take the bandage off to keep the plaintiff from vomiting; that she vomited and ran a temperature right along; that she had menorrhea, that is, a flow of blood that is not normal, that continued off and on during the entire time he treated her; that the peritonitis developed over the whole abdomen; that on the first day he visited her a vaginal examination showed a very tender uterus, and an examination of the urine showed some blood; that her temperature on April 28 was about 102; that the highest he recorded was 103; that she had fluctuations of temperature, sometimes it would be normal, sometimes 101, sometimes 102. This doctor treated her until some time in July. In the latter part of May he advised an operation. Dr. Butler was first called on April 29, 1926, to treat her for a trouble that developed in her left ear. He testified that by the use of the orthoscope electrically illuminated he made an examination of the middle ear, or ear drum, of the left ear of the plaintiff; that he "found instead of a shining spot on the drum that is natural to be there, I found a dullness of the drum with a beefy redness on the ear drum. It indicated then the beginning of congestion - beginning inflammation;" that he treated the ear for about a month and on May 1st he detected a slight bulging of the ear drum, that the beefy redness was still there and the bulging continued and that on May 10th the ear drum ruptured itself and it suppurated from that time until May 25th - a pus discharge, and that on May 25th the treatment for the ear was discontinued and that at that time "the discharge had ceased

the patient; this was because he had not very much

of the disease, and the condition was

not very serious, and the patient

was not very much affected, and the

condition was not very serious, and

the patient was not very much

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not very serious, and the patient

was not very much affected, and

and the drum, even though slightly puckered, had been restored in almost good condition, so to speak." On July 20, 1926, Dr. Holloway ceased treating the plaintiff and Dr. Butler was again called in. He then for the first time made an examination of the abdomen and the female organs. From this examination he made the diagnosis that the plaintiff had traumatic peritonitis; "my diagnosis was based on my history and examination, history, symptoms, tests, examination, * * yes, I could make a diagnosis from a physical examination;" that prior to the operation the plaintiff had constant vaginal bleeding. Dr. Butler advised an operation and arranged to have Dr. Culbertson perform the same.

Dr. Culbertson, who performed the operation (Dr. Butler assisting) on July 23, 1926, never saw the plaintiff until just before the time of the operation. He testified that immediately before the operation he made an examination of her that lasted only a few minutes; that the examination showed deep tenderness of the right lower portion of the abdomen, that is, tenderness on deep pressure, but that otherwise the abdomen was negative, except for the scar of the old operation; that the womb was upright in fairly normal position; that it was slightly enlarged and fixed; that there was a mass filling the right pelvis, which was tender, and this mass was in the portion of the abdomen which is confined within the bones forming the pelvic girdle; that after the abdominal wall was opened he found evidence of peritonitis, and the omentum, which is a sheet of tissue that hangs from the large bowel like an apron, was adhered to the inner surface of the abdominal wall itself, beneath the old scar; that the cecum had grown fast to the right pelvic wall and the ileum had become fast to the right corner, or horn, of the womb on its posterior side; that the womb was slightly enlarged and baggy and upright and the

and the drum, even though slightly damaged, had been returned
in almost good condition, no repair. On July 20, 1900, Dr.
Heller, seeing that the patient and Dr. Heller was again
called in. He then for the first time made an examination of the
abdomen and the female organs. From this examination he made the
diagnosis that the patient had "uterine prolapse."
Heller was called in by Dr. Heller and Dr. Heller, who
saw, examination, "I see, I could make a diagnosis from a
physical examination," that prior to the operation the patient
had sustained vaginal disease. Dr. Heller advised an operation
and arranged to have Dr. Gibson perform the same.
Dr. Gibson, who performed the operation (Dr. Heller
assisting) on July 20, 1900, never saw the patient until
before the time of the operation. He testified that immediately
before the operation he made an examination of her that lasted
only a few minutes; that the examination showed deep tenderness
of the right lower portion of the abdomen, that is, between
on deep pressure, but that otherwise the abdomen was soft;
except for the size of the old operation; that the womb was up-
right in fairly normal position; that it was slightly enlarged and
thick; that there was a mass filling the right pelvis, which was
benign, and this mass was in the position of the abdomen which is
confined within the pelvic ring; that after
the abdominal wall was opened he found evidence of peritonitis,
and the omentum, which is a mass of tissue that hangs from the
large bowel like an apron, was adhered to the inner surface of the
abdominal wall itself. Between the old mass and the omentum
grew fast to the right pelvic wall and the liver and became fast
to the right corner, or horn, of the mass on its posterior side;
that the mass was slightly enlarged and boggy and bright and the

left tube and ovary had sagged down behind the womb and had grown fast to the pelvic wall; that the right ovary had sagged down behind the womb and had "become stuck fast to the pelvic wall;" that he found evidence of an inflammation of the womb and of the left tube; that he believes there is such a thing as traumatic peritonitis; that traumatic peritonitis may result in very serious things, it may be so severe as to cause death or a patient may recover from it and be entirely well afterwards, or a patient may recover from it and the result of the swelling and inflammation in the peritoneum may form adhesions between the structures lying in approximation of one another and covered with this peritoneum. In response to a question as to whether or not he found any inflammation of the peritoneum at the time of the operation he stated: "The evidence that there had been a peritonitis there, the evidence of the present peritonitis existed probably in that portion of the lymphatic organs which have already been referred to, the womb and the left tube, they were swollen, soft and baggy, and gave evidence of a traumatic inflammation." (Italics ours.) The defendant apparently appreciates the importance of this statement of Dr. Culbertson, and in its brief thus meets it: "From a consideration of all of Doctor Culbertson's testimony, it is manifest that the use of the word 'traumatic' in this connection, was either a mistake on the part of the court reporter, or a lapsus lingue upon the part of the witness." This argument of the defendant cannot, of course, be seriously considered. Nor does the record bear out the further contention of the defendant that the statement in question is entirely at variance with all the other testimony of Dr. Culbertson, for when this witness was called by the defendant as an expert, on cross-examination, the following occurred: "Q. Do you think the peritonitis that

developed there after that blow was caused by the blow in any degree? A. I do. Q. If this woman was well, this hypothetical woman was apparently well and active before, and she got this blow in the abdomen, and these other injuries that counsel has detailed, it might have considerable to do with what followed, might it not, in the absence of any explanation to the contrary?

A. It might. Q. Trauma may produce peritonitis? A. It may." The witness further testified that an inflammation of the peritoneum may communicate itself to the organs beneath, that they are very closely related in their position. "Q. And is there anything - do you think that this blow that this woman got in the abdomen this hypothetical person, that it was sufficient to cause a bulging and a slight ventral hernia there, that has subsided, do you think that might have had anything to do with the conditions that you found there three months later? A. It might. Q. And trauma may produce disturbances of different kinds in the pelvic and generative organs, may it not, a blow over the region of the location of those organs? Various disturbances and ill effects? A. It may."

Dr. Scott testified that trauma may cause peritonitis and that a peritonitis that lasts for two or three months nearly always communicates itself to the organs of the abdominal cavity and may cause an inflammation of the ovarian tubes and of the uterus, like peritonitis; that it is a common thing for peritonitis to cause adhesions, and adhesions always mean inflammation; that a blow to the abdomen which causes peritonitis to develop, with a temperature that continues for two and a half months, may cause an inflammation of the ovarian tubes and of the uterus, like peritonitis.

Dr. R. W. Woods (called by the defendant), a physician

developed there after that time was caused by the film in my
 bag? A. I am not sure. If this woman was well, this hypothesis
 woman was apparently well and active before, and she got into
 place in the abdomen, and there other things that I cannot find
 detailed, it might have considerable to do with that. I know
 might it not, in the absence of any explanation of the contrary?
 A. It might. It seems very probable that it is not.
 The things that I have mentioned that are information of the
 position may communicate itself to the organs themselves, and
 they are very closely related in their position. It is not, and it
 these organs - do you think that this film was not
 in the abdomen this hypothetical person, that it was not
 to cause a bulging and a slight swelling there, and was
 included, do you think that might have had any thing to do with
 the condition that we have there since January 11, 1912
 right. It seems very probable that the displacement of different things
 in the pelvis and generative organs, may it not, a film over the
 region of the location of these organs? Various displacements and
 all effects. A. It may.
 It seems possible that there may cause peritonitis
 and that a peritonitis that lasts for two or three months nearly
 always communicates itself to the organs of the abdominal cavity
 and may cause an inflammation of the ovarian tubes and of the
 uterus. This peritonitis that it is a common thing for peritonitis
 to cause adhesions, and adhesions always cause inflammation; that
 a film to the abdomen which causes peritonitis to develop, with a
 peritonitis that continues for two and a half months, may cause
 an inflammation of the ovarian tubes and of the uterus, like
 peritonitis.
 Dr. A. W. Woods (called by the defendant), a physician

living at Jasper, Alabama, went to the scene of the accident at the request of an agent of the defendant and remained on the ground for about an hour, rendering such aid as he could to the injured. He testifies that in the course of his work he met the plaintiff and asked her how she escaped being hurt, and that she answered: "Well, she said that she was not seriously hurt, she hoped, or something to that effect;" that she was perfectly composed and calm, and in her facial expression there was not the first indication that she had any physical injury whatever; that she moved about freely; "Q. Did she limp as she moved about? A. I did not see any; I could not be positive about that, but I did not notice that she did;" that he did not notice her holding her hand to her stomach and going about in a stooping posture; that he gave her no treatment or medicine and made no examination of her; that he personally attended three or four people who were injured, two of them seriously; that from the time of the accident until two or three months ago he had not given the matter of the plaintiff a single thought, and he made no report as to her. Dr. Eggleston (called by the defendant) was a passenger on the north-bound train and testified that he went through the coaches of the south-bound train at the request of a Pullman maid and rendered aid to the injured; that he should judge that the plaintiff was the woman that made the request; that she is very similar in stature and complexion; that she mentioned nothing as to any injury to herself and he did not see any marks of injury about her face or any other parts of the body; that he saw her only on the occasion when she came to him and asked him to go through the coaches; that he did not see her walk in a stooped posture or hold her hand to her side, and he cannot recall that she walked with a limp. Dr. Camp (called by the defendant), a physician of Jasper, Alabama, was called to the wreck and rendered first aid to some of those who were injured.

He testified that he saw the plaintiff and she gave no outward appearance of any pain or agony or injury of any kind, and he did not see her hold her hand to her side and walk in a stooped posture, and did not notice any limp in her walk; that he did not ask her if she was injured. Dr. R. M. Graham, medical examiner for the Pullman Company (called by the defendant), testified that he went to the home of the plaintiff the day after she arrived in Chicago; that he examined her head, ankle and abdomen; that he was unable to find any injury to the head; that she stated she was having trouble with her neck and that she had been struck on the back of her head, but that he did not find any marks or abrasions of any kind there; that she claimed that her ankle was sprained and he found it very loosely bandaged and he slipped the bandage up and found nothing there except that immediately below the ankle bone there was a small area of localized, slightly tender area; that he found no external marks of injury on her abdomen; that the patient was lying in bed and apparently not ill; that on exposing the abdomen a huge scar was apparent and on palpating it, the right lower quadrant, that is in the right lower portion, near the base of the scar, there was a small, slightly elevated tender area that she claimed was very tender on pressure, and she stated "that there had been an inguinal hernia there," but found none; that "there was a very slight general tenderness of the abdomen; the tenderness was local, namely in the right lower quadrant, and I was unable to find any definite, acute sign of any injury; there was no discoloration and no evidence of bruising;" that her pulse was 72 and he judged she had no temperature; that he "told her that in order to take care of her, however, I would have to remove her to St. Luke's hospital, where she would be placed under the care of Dr. Meek and our staff of physicians;" but that she said

He testified that he saw the plaintiff and she gave no answer
to any question of any kind or agency or injury of any kind, and he
did not see her held her hand to her side and walk in a stooped
posture, and did not notice any limp in her walk; that he did
not ask her if she was injured. Dr. M. M. Graham, medical examiner
for the Pullman Company (called by the defendant), testified that
he went to the home of the plaintiff the day after she arrived in
Chicago; that he examined her hand, neck and shoulder; that he was
unable to find any injury to the hand; that she stated she was
having trouble with her neck and that she had been struck on the
back of her head, but that he did not find any marks or abrasions
of any kind there; that she stated that her neck was swollen
and he found it very loosely packaged and he alleged the package
up and found nothing there except that immediately below the swelling
there was a small area of laceration, slightly tender and
that he found no external marks of injury or any swelling; that
the patient was lying in bed and apparently not ill; that on the
morning the afternoon a large scar was apparent; and on September 12,
the right lower extremity, that is in the right lower portion of the
the base of the neck, there was a small, slightly elevated tender
area that she stated was very tender on pressure, and she stated
"that there had been an internal rupture there," but found none; that
"there was a very slight general tenderness of the abdomen; the
tenderness was local, namely in the right lower quadrant," and
was unable to find any definite, acute sign of any injury; that
there was no discoloration and no evidence of "bruise" after her return
was 72 and he judged she had no tenderness; that he "told her
that in order to have more of her, however, I would have to remove
her to St. Luke's hospital, where she would be placed under the
care of Dr. Mack and our staff of physicians," but that she would

that she could not decide at that time whether to go to the hospital or not. On cross-examination this witness testified that she told him that she had another doctor "and the prescriptions and everything were there;" that he did find a localized swelling in the lower portion of the right lower quadrant, a slight bulging of the abdomen; that the bulging was in "the right lower quadrant immediately above the super pubic, just lateral to the ear;" that he did not look at the ear drum of the plaintiff, and did not make a vaginal examination as the woman was flowing at the time; that the plaintiff "had medicine, and in general I told her to go on the way she was;" that he wanted to have the woman taken to the hospital in order to be absolutely sure that there was not anything the matter with her as the examination he made at the house was "not sufficient, no, to determine the full details;" that she told him she was having pain in her right lower abdomen. Scott Brown (called by the defendant), a porter on the south-bound train, testified that he and a waiter named Nunyon were seated in the front end of the car, in section 9; that he was facing forward and Nunyon backward; that the plaintiff was facing forward and that when the train hit he was knocked against the waiter "and the maid, if I can remember well, slid under the seat, under the seat;" that he was knocked against the wall; that he saw her immediately after the collision, but not afterwards; that he saw no marks of injury on the plaintiff; that "after it hit, I was dazed a little, and when I woke up I saw her under the seat;" and do not know whether or not she was thrown forward and back. Willis Nunyon, a waiter (called by the defendant), testified that the first he saw of the plaintiff after the crash she was crawling out from under the seat and getting off the floor; that her feet were under the seat and she was on her back; that he had two teeth knocked out and his back was hurt,

that the child was located at that time under 20 to 25 feet
away from the witness. On that occasion the witness testified
that the child was not in the room and that the witness
and the child were there; that he did not know where the child
was located at the time of the child's death. A slight distance
in the lower portion of the right lower quadrant, a slight distance
of the child; that the child was in "the right lower quadrant
immediately above the right hip, just below the neck; that
he did not look at the child at the time, and did not make
any attempt to locate the child in the room; that
the plaintiff had not been in the room, and in general I told her to go on
the way she was; that he wanted to have the woman taken to the
hospital in order to be absolutely sure that there was not anything
the matter with her on the examination in order to be sure
"and otherwise, he is concerned in the child's death; that the
child was not having pain in her right lower quadrant, and
from (called by the defendant), a doctor on the coast-bound train,
testified that he and a woman named "Nancy" were seated in the train
and at the end of the day, in order to get to the coast-bound train
boarded; that the plaintiff was looking toward the child when she
testified that he was looking toward the child and the child; that I can
remember well, and when the child was in the room, that he was
looking toward the child; that he was not immediately after the
collision, but not afterwards; that he saw no motion of the child in
the plaintiff's room; that he was a doctor, and when
I went up I saw her under the neck; and he was then looking at her
she was looking toward the child; that the plaintiff called
by the defendant, testified that the child was in the room of the plaintiff
after the crash and was crawling out from under the seat and passing
off the floor; that the child was under the seat and was on
the floor; that he had two people running out and his back was hurt.

and that twenty or twenty-five minutes after the accident the plaintiff applied some iodine to abrasions on his face; that he did not see any appearance of injury about her at that time and she did not claim to him that she was injured, and he did not notice any limp in her walk and did not notice her hold her hands to her stomach. On cross-examination the following occurred:

"Q. You did not watch her; you were not thinking about raising her up, to see how she was getting around? A. No, I was pretty well crippled up myself. Q. She might have walked, and limped, and she might have walked and held her side, for anything that you know? A. Yes, because I don't know whether she did, I don't know." The witness further testified that about half an hour after the accident he was carried to the hospital.

The defendant called as experts three doctors, Tenney, Aste and Culbertson, and a long hypothetical question was put to each of them, and each answered that, based upon the facts assumed in the question, it was his opinion that there was no causal relation between the conditions found at the time of the operation on July 23, 1926, and the injury received by the hypothetical patient in the railroad wreck. As has been repeatedly said by our Supreme Court, testimony of this character is merely the opinion of the witness based upon the facts assumed in the hypothetical question, and it is for the jury to determine the truth in regard to the assumed facts, as well as any others which might tend to confirm or modify their reliance upon the opinion given. (See Fuhrer v. The Chicago City Ry. Co., 239 Ill. 548, 552, and cases cited therein.) While it is the law that if the material facts in the case are in dispute the party examining the expert witness may include in the hypothetical question only those facts as tend to establish and fairly present his claim or theory, nevertheless,

and that twenty or twenty-five minutes after the accident the
plaintiff applied some lotion to the abrasion on his face; that he
did not see any appearance of injury where he was struck; that the
one did not of it to him that he was injured, and he did not
notice any limp in her walk and did not notice her hand was hurt
to her stomach. On cross-examination the following occurred:
"Q. You did not watch her; you were not thinking about riding
her up, to see how she was getting around? A. No, I was pretty
well occupied up there. Q. She might have walked, and limped,
and she might have walked and held her side, for anything that
you saw? A. Yes, because I don't know whether she did, I can't
know." The witness further testified that about half an hour
after the accident he was carried to the hospital.
The defendant called an expert, James Watson, Toronto,
and a long hypothetical question was put to
each of them, and each answered that, based upon the facts assumed
in the question, it was his opinion that there was no causal
relation between the condition found at the time of the operation
on July 20, 1926, and the injury received by the (plaintiff)
patient in the railroad wreck. An hour or so later the witness
testified that the testimony of this witness as to merely the opinion
of the witness based upon the facts assumed in the hypothetical
question, and it is for the jury to determine the truth in regard
to the assumed facts, as well as any others which might come to
their attention or which their testimony upon the opinion given. (See
Exhibit 7 - The Medical Evidence, pp. 330-331, 342, 343, and 344)
After this, the witness testified that it is his opinion that the medical facts
in the case are in dispute and that the expert witnesses
and the jury in the hypothetical question only those facts as found
in the evidence and taking account the finding of theory, notwithstanding

"it is for the jury to determine the weight and value of such opinions when considered in connection with all the evidence in the case." (City of Chicago v. Ridier, 227 Ill. 571, 580.) In the instant case, if the jury believed certain material facts in proof bearing upon the subject matter of the hypothetical question and not included therein, they would be justified, in our opinion, in giving little or no weight to the aforesaid answers of the experts. A great deal of evidence that strongly supports the plaintiff's theory of fact and that tends to rebut the defendant's theory of fact was omitted from the question. To illustrate: The question ignores very essential parts of the uncontroverted testimony of Dr. Scott, who performed the operation on the plaintiff in 1922, viz., that in his judgment the inflammation that closed the end of the right Fallopian tube most probably came from the appendix; the nature of the tests he made to determine if the plaintiff had any venereal disease; the testimony that when he removed the appendix and the tube there was no infection of the other genital organs, and that the plaintiff made a fine recovery. Dr. Scott was very positive in his testimony that there was no infection of the genital organs that remained after the operation. The hypothetical question ignores the uncontradicted testimony of the plaintiff^{that} from the time of the operation in 1922 until the time of the accident she enjoyed good health, felt well, was "active and worked," and that from October, 1928, until the accident she "never missed a trip." It ignores the testimony of Dr. Holloway that the plaintiff developed peritonitis from the contusion; that the flow of blood from which the plaintiff suffered after the accident was menorrhoea, that is, a flow that is not normal, and it assumes, in the question, that the flow was "irregular menstruation." It further ignores Dr. Holloway's testimony that peritonitis developed over the whole abdomen and that an examination showed a very

"It is in the jury to determine the weight and value of such
evidence when considered in connection with all the evidence in
the case." (111 Ill. 271, 280.) In
the instant case, if the jury believed certain material facts in
great bearing upon the subject matter of the hypothetical question
and not inclined therein, they would be justified, in my opinion,
in giving little or no weight to the adverse answers of the
expert. A great deal of evidence has already appeared in the
plaintiff's theory of fact and that tends to rebut the defendant's
theory of fact was omitted from the question. To illustrate: The
question ignores very essential parts of the uncontroverted testimony
of Dr. Gault, who performed the operation on the plaintiff in 1935,
also, that in his judgment the inflammation that closed the end of
the right fallopian tube most probably came from the appendix.
The nature of the issue to be determined is the plaintiff's
had any venereal disease; the testimony that when he removed the
appendix and the tube there was no infection of the tube genital
organs, and that the plaintiff made a full recovery. Dr. Gault
was very positive in his testimony that there was no infection
of the genital organs that would have affected the operation. The
hypothetical question ignores the uncontroverted testimony of the
plaintiff from the time of the operation in 1935 until the time of
the accident and ignores good health, this will, the "active and
worked," and from October, 1935, until the accident the "never
missed a day." It ignores the testimony of Dr. Sullivan that the
plaintiff developed gonorrhea from the condition that the flow
of blood from which the plaintiff suffered after the accident was
nonvenereal, that is, a flow that is not harmful, and is common, in
the question, that the flow was "irregular menstruation." It
ignores Dr. Sullivan's testimony that gonorrhea developed
over the whole abdomen and that an examination showed a very

tender uterus and that the urine showed some blood. It ignores the testimony of Dr. Butler that he made a diagnosis that the plaintiff was suffering from traumatic peritonitis and that he treated her for that trouble for several weeks. It ignores the testimony of Dr. Culbertson that the womb and left tube were swollen, soft and baggy, and gave evidence of a traumatic inflammation. It ignores entirely the force of the collision between the two trains and the effect of the same on the trains and many passengers. It assumes that the hypothetical woman immediately after the accident and for two and a half to three hours thereafter worked continuously and strenuously in the matter of rendering aid to injured persons and that during all this time the only unusual thing that she noticed in her physical condition was a vaginal bleeding discharge that she discovered about an hour and a half after the collision. It ignores the testimony of Miss Stockton, Mr. McGrail and the plaintiff as to the physical condition of the plaintiff during the time she assisted in taking care of the injured. We are satisfied that the jury were justified in finding that the hypothetical question did not fully and fairly present all the material proof bearing upon the question as to whether the conditions that made the operation of July 26, 1926 necessary, were proximately caused by the accident in question. And it will be noted that Dr. Tenney, as well as Dr. Kate, predicated his answer to the hypothetical question upon the assumption that "the condition discovered at the time of the operation in 1926 is a direct continuation of the same disease processes which called for the operation in 1923," and therefore the jury in determining the value and weight of the answers had the right to test them in the light of the evidence of Dr. Scott and other important facts and circumstances in proof. Dr. Tenney,

as well as Dr. Aste, testified that none of the injuries received by the hypothetical woman in the collision had anything whatsoever to do with starting up the trouble that was afterwards found. As this testimony is completely rebutted by certain indisputable facts in the case and is contradicted by the testimony of Dr. Culbertson, also an expert for the defendant, it is entitled to very little weight. The jury also had the right in determining the weight that should be attached to the testimony of Dr. Tenney, to take into consideration the fact that he admitted that he had "served as an expert" for the defendant company for four or five years and that he had testified in that capacity in twenty-five or thirty cases.

The plaintiff did not put a hypothetical question to any of the doctors she called and the defendant argues at considerable length that the plaintiff's case is thereby greatly weakened. He fails to see any force in this argument. Doctors called by the plaintiff testified to the conditions they found and gave their diagnoses of the cause of the conditions. Under such a state of the evidence it was unnecessary to put a hypothetical question to them.

At the request of the defendant the court gave to the jury six instructions in which the jury were very fully and fairly instructed as to the rules of law that must govern them in determining whether or not the operation of July 28, 1926, was necessitated by the injuries. Under the facts of this case, the question whether the conditions for which the operation was performed in July were the result of the accident, was plainly one for the jury (see Mantaler v. Crane Co., 213 Ill. App. 267 (certiorari denied by the Supreme Court), and Chicago Union Traction Co. v. May, 221 Ill. 530), and the jury by their verdict have found that the diseased condition of the womb and the left Fallopian

as well as Dr. Aaga, testified that none of the injuries received by the hypothetical woman in the collision had anything whatsoever to do with starting up the trouble that was at issue in this case. In this testimony is completely refuted by certain inadmissible facts in the case and is contradicted by the testimony of Dr. Aaga. Also an expert for the defendant, it is entitled to very little weight. The jury also had the right in determining the weight that should be attached to the testimony of Dr. Aaga. In this case, the fact that he admitted that he had "never seen a car" for the purpose of the trial is not a factor in the case. The plaintiff did not put a hypothetical question to any of the doctors, he called and the defendant argues at one-
 At the time the plaintiff's name is thereby greatly
 called by the plaintiff testified to the condition they found
 and gave their diagnosis of the cause of the condition. Under
 such a state of the evidence it was unnecessary to put a hypothetical question to them.

At the request of the defendant the court gave to the jury the instructions in which the jury were very fully and fairly instructed as to the law that must govern them in determining whether or not the operation of July 22, 1908, was necessary by the plaintiff. Under the facts of this case, the question whether the conditions for which the operation was performed in July were the result of the accident, was plainly one for the jury. The court's instruction in this regard was correct. The court's instruction in this regard was correct. The court's instruction in this regard was correct.

At the request of the defendant the court gave to the jury the instructions in which the jury were very fully and fairly instructed as to the law that must govern them in determining whether or not the operation of July 22, 1908, was necessary by the plaintiff. Under the facts of this case, the question whether the conditions for which the operation was performed in July were the result of the accident, was plainly one for the jury. The court's instruction in this regard was correct. The court's instruction in this regard was correct. The court's instruction in this regard was correct.

tube on July 28, 1926, was a proximate result of injuries sustained by the plaintiff in the train collision, and after a very careful study of the record, we have reached the conclusion that that finding is not manifestly against the weight of the evidence in the case. In fact, we think that finding was fully justified, under all the evidence.

The defendant claims that the amount of the verdict is grossly excessive, but this contention is based upon the assumption that the diseased condition found to exist in the plaintiff's womb and left Fallopian tube in July, and which necessitated the surgical operation of that date, was not a proximate result of any injuries received by the plaintiff in the accident. That we have heretofore said in this opinion sufficiently disposes of the present contention. We might add, however, that after a full consideration of all the evidence bearing upon the question of damages, we have reached the conclusion that the amount awarded by the jury is not excessive.

An able and careful trial judge saw fit to enter judgment on the verdict, and it is noteworthy that the defendant has not seen fit to question a single ruling of the trial judge save in a single instance wherein it insists that the trial court should have instructed the jury not to award the plaintiff any sum by way of damages on account of the ailments and disabilities of the plaintiff for which the operation was performed on July 28, 1926. The defendant has had a fair and impartial trial and the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Mr. Justice Gridley concurs.

Mr. Presiding Justice Barnes specially concurring:

While not entirely satisfied with the character

of evidence relied on by plaintiff to show that the accident was the proximate cause of the condition necessitating the subsequent operation, involving as it does technical and scientific knowledge that should be adequately furnished to a jury before it could intelligently pass upon the facts, and while plaintiff did not undertake to refute defendant's expert evidence on the subject which was unquestionably competent, and might easily have been refuted if not well founded, yet I am unable to say that the verdict is manifestly against the evidence, or that the inferences drawn therefrom in the opinion are not justified.

PEOPLE OF THE STATE OF
ILLINOIS ex rel. Robert
E. Crowe, State's Attorney,
Defendant in Error.

v.

MILTON DENNEY and GEORGE W. RAY,
Plaintiffs in Error.

Impleaded with Roy S. Pipes
and Walter T. Larsen.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 24, 1926, two informations were filed in the Municipal Court of Chicago, charging the defendants Roy S. Pipes, Milton Denney (called in the information Milton Denney), George W. Ray and Walter T. Larsen with a violation of the Illinois Securities Law. (Cahill's St., ch. 32, sec. 264 et seq.) The defendants Pipes and Larsen were granted severances and the instant cases were tried only as to the plaintiffs in error, Milton Denney and George W. Ray. The defendants waived a jury and the two causes were submitted to the court, and, after hearing, the defendants were found guilty as charged in each information and a fine of \$7500 as to each defendant was imposed in each case. On motion the instant case was consolidated for hearing in this court with People of the State of Illinois, ex rel. Robert E. Crowe, State's Attorney, v. Milton Denney and George W. Ray, Impleaded with Roy S. Pipes and Walter T. Larsen, No. 32155.

The information in the instant case contains four counts. The first alleges that the defendants, being officers, directors, trustees and agents of a so-called common law trust,

RETURN TO NORTHERN

COUNT OF CHICAGO

REPORT OF THE STATE OF
ILLINOIS ex rel. Edward
K. Grooms, State's Attorney,
Petitioner in Error.

MILTON JENNEY and GEORGE W. HAY,
Defendants in Error.

Included with Ray E. Tipton
and Walter T. Tipton.

THE COURT OF THE COMMONS BETWEEN THE COURT OF THE COURT.

On December 20, 1905, two informations were filed in

the Municipal Court of Chicago, charging the defendants Ray E.
Tipton, Milton Jenny (called in the information Milton Jenny).

George W. Ray and Walter T. Tipton with a violation of the

Illinois Securities Law. (Cahill's Stat., ch. 38, sec. 264 et seq.)

The defendants Tipton and Ray were granted severance and the

instant cases were taken only as to the plaintiff in error.

Milton Jenny and George W. Ray. The defendants waived a jury

and the two cases were submitted to the court, and, after hearing,

the defendants were found guilty as charged in each information

and a fine of \$7500 as to each defendant was imposed in each case.

On appeal the instant case was consolidated for hearing in this

court with people of the State of Illinois, ex rel. Edward K.

Tipton, State's Attorney, v. Milton Jenny and George W. Ray.

Included with Ray E. Tipton and Walter T. Tipton. No. 2110.

The information in the instant case contains four

counts. The first alleges that the defendants, being citizens,

discovered, purchased and opened of a so-called common law trust,

to-wit: Las Animas Mining and Milling Company, on to-wit: October 24, 1925, at and within the City of Chicago, County of Cook and State of Illinois, did unlawfully offer to sell to Joseph W. MacDonald, securities defined by the Illinois Securities Law as Class "B" securities, without compliance with the provisions of said law and without the issuer thereof having first filed in the office of the Secretary of the State of Illinois, the statements and documents as required by said Act: that the securities so offered for sale to the said MacDonald were beneficial interests in a so-called common law trust known as Las Animas Mining and Milling Company and that the said securities were not in law exempt from compliance with the provisions of said Act. The second count charges the defendants with unlawfully selling to MacDonald beneficial interests in said company. The third count charges the defendants with authorizing, aiding or assisting the Las Animas Mining and Milling Company in the unlawful sale of said securities to MacDonald. The fourth count charges the defendants with selling said securities to MacDonald and divers other persons whose names are unknown. The information in case No. 32153 is substantially the same as that in the instant case, save that in case No. 32153 the complaining witness is A. C. Bowers.

The Las Animas Mining and Milling Company was organized as a common law trust under a declaration of trust dated May 4, 1925. Milton Kenney, Roy S. Pipes and Clarence T. Bush were made trustees of the trust estate. The trust estate purported to consist of a lease to certain mining properties in the State of Nayarit, Mexico, known as the San Miguel, Zapopan and Las Animas mines. Henry W. Thornton claimed to be the owner of the mining

deceased: The Adams Mining and Milling Company, on or about
October 24, 1928, at and within the City of Chicago, County of
Cook and State of Illinois, the undersigned after to sell to
Joseph W. McDonald, associations defined by the Illinois Constitution
law as class "no association, without compliance with the
provisions of said law and without the former thereof having
first filed in the office of the Secretary of the State of
Illinois, the statements and documents as required by said law;
and the associations as referred for sale to the said McDonald
were beneficial interests in a so-called common law trust known
as the Adams Mining and Milling Company and that the said
associations were not in law exempt from compliance with the
provisions of said law. The second cause charges the defendants
with unlawfully selling to McDonald beneficial interests in said
company. The third cause charges the defendants with conspiring,
aiding or assisting the Adams Mining and Milling Company in
the unlawful sale of said associations to McDonald. The fourth
cause charges the defendants with selling said associations to
McDonald and divers other persons whose names are unknown. The
information in case No. 28152 is substantially the same as that
in the instant case, save that in case No. 28152 the complaining
witness is J. C. Brown.

The Adams Mining and Milling Company was organized
as a common law trust under a resolution of trust dated May 4,
1928. Milton Kennedy, Roy E. Piper and Clarence T. Nash were members
of the trust estate. The trust estate purported to own
also of a lease to certain mining property in the State of
Idaho, known as the San Miguel, Teton and Lee Adams
mines. Henry W. Thomson claimed to be the owner of the mining

property and that he purchased it in the year 1906. On July 22, 1924, Thornton entered into a working lease of this property with George F. Ray and Charles D. DuBois as leasees. On August 29, 1924, Ray and DuBois entered into a contract with one Everett G. Ballard. This contract recites the making of the lease between Thornton and Ray and DuBois and that Ray and DuBois desired to obtain the services of Ballard to raise necessary funds to carry out their obligations under the said lease "and it is agreed that if second party (Ballard) upon inspection of the properties, finds the representations made to him and to the first parties (Ray and DuBois) by Henry W. Thornton are true, that he will raise the funds in accordance with the mining lease and the first parties agree, in consideration of the services of second party that if after inspection of the properties by second party, he, the said second party, so directs, to organize a corporation and to transfer to such corporation the said mining lease, issuing to said second party 55 per cent of the capital stock with 45 per cent thereof to be retained by first parties." Ballard failed to supply the capital to operate the mines, and on April 20, 1925, he was notified that he had forfeited his rights under the agreement of August 29, 1924, and that said agreement was terminated and cancelled. On April 1, 1924, Thornton cancelled the lease with Ray and DuBois, and thereafter, on April 28, 1925, he entered into a lease of the property with the defendant Walter F. Larsen as lessee. Larsen, in turn, transferred and assigned this lease to the Las Animas Mining and Milling Company, the common law trust mentioned in the informations. On October 14, 1924, while the lease from Thornton to Ray and DuBois was still in effect and the contract between Ray and DuBois and Ballard still in force,

property and that he purchased it in the year 1904. On July 22, 1904, Thomson entered into a working lease of this property with George W. Ray and Charles L. Doherty as lessees. On August 27, 1904, Ray and Doherty entered into a contract with one Robert J. Ballin. This contract provides for the making of the lease between Thomson and Ray and Doherty and that Ray and Doherty desired to obtain the services of Ballin to raise necessary funds to carry out their obligations under the said lease and it is agreed that it second party (Ballin) upon inspection of the property, finds the representations made to him and to the first parties (Ray and Doherty) by Henry W. Thomson are true, that he will raise the funds in accordance with the mining lease and the first parties agree, in consideration of the services of second party that it after inspection of the property by second party, he, the said second party, so called, so organize a corporation and so transfer to such corporation the said mining lease, together to said second party 50 per cent of the capital stock with 40 per cent thereof to be retained by first parties. Ballin failed to supply the capital to operate the mines, and on April 30, 1905, he was notified that he had forfeited his rights under the agreement of August 27, 1904, and that said agreement was terminated and cancelled. On April 1, 1904, Thomson cancelled the lease with Ray and Doherty, and Thomson, on April 28, 1905, he entered into a lease of the property with the defendants Walter T. Watson as lessees. Watson in turn, transferred and assigned this lease to the Los Angeles Mining and Milling Company, the common law trust mentioned in the instrument, on October 14, 1904, while the lease from Thomson to Ray and Doherty was still in effect and the contract between Ray and Doherty and Ballin still in force.

the defendant Ray made and executed a certain assignment, which contains, inter alia, the following provisions:

"WHEREAS said Ray and DuBois have secured a financing arrangement which provides for the financing of the operation of said mines and

"WHEREAS said arrangement provides that the undersigned, George W. Ray together with Chas. D. DuBois are to have an interest equal to 45% of the net profits made in said mines, which interest has been divided into 90 units for the purpose of making a division among those now and those to become interest in said profits and

"WHEREAS said George W. Ray has retained for himself 50 units - Now, therefore, in consideration of the sum of Seven Hundred and Fifty Dollars, paid by J. N. MacDonald, the receipt whereof is hereby acknowledged, the said George W. Ray does hereby assign and transfer all his right, title and interest to one unit of his share to be the property of the said J. N. MacDonald, his heirs, executors and assigns.

"And the said George W. Ray agrees that he will transfer to the order of said J. N. MacDonald as soon as corporation or syndicate is formed an instrument either stock certificate, or certificate or participating royalty agreement or any other paper representing said unit which shall be of the same proportion as this unit bears to the whole."

This assignment was witnessed by the defendant Larsen and was handed to MacDonald a few days after January 14, 1925. On January 14, 1925, MacDonald, in payment of the \$750 mentioned in the assignment, issued a check for \$750, payable to the order of Larsen, and this check was indorsed by Larsen, Kate Wood Ray and Geo. W. Ray. It appears that MacDonald was an old friend of Larsen, and that he made the investment in question because he thought it would help Larsen and because of his understanding that Larsen was to be elected treasurer of the corporation contemplated in the said assignment when the same was formed, and was to have charge of the American end of the business. About the 1st of January, 1926, the defendant Larsen handed to MacDonald the following certificate:

the corporation has been and is being a certain assignment, which

concludes, inter alia, the following provisions:

"WHEREAS said Ray and Hahn have secured a financing arrangement which provides for the financing of the operation of said mine and

"WHEREAS said arrangement provides that the corporation, George W. Ray, together with Hahn, are to have an interest equal to 50% of the net profits made in said mine, which interest has been divided into 50 units for the purpose of making a division among them and those to whom interest in said profits and

"WHEREAS said George W. Ray has retained for himself 30 units - now, therefore, in consideration of the sum of seven hundred and fifty dollars, said J. H. Macdonald, the receipt whereof is hereby acknowledged, the said George W. Ray does hereby assign and transfer all his right, title and interest in one unit of his share in the property of the said J. H. Macdonald, his heirs, executors and assigns.

"And the said George W. Ray agrees that he will transfer to the owner of said J. H. Macdonald as soon as corporation or syndicate is formed an instrument of assignment or assignment, or certificate of participation in the net profits of the mine, or any other paper representing said unit which shall be of the same value as this unit bears to the whole."

This assignment was witnessed by the following persons and was

dated at Reno on a few days after January 14, 1935. On

January 14, 1935, Macdonald, in payment of the \$750 mentioned

in the assignment, issued a note for \$750, payable to the order

of Hahn, and said note was delivered to Hahn by said Ray

and Geo. W. Ray. It appears that Macdonald was on his return at

that time, and that he made the investment in question because he

thought it would help Hahn and because of his understanding that

there was to be a great investment in the mine and that

in the said assignment from the same was formed, and was to have

charge of the northern end of the business. About the 1st of

January, 1935, the document last mentioned to Macdonald was

following certificate:

| | | |
|---------------------------------------|-------------------------|----------------------|
| | "Capital \$2,000,000.00 | |
| Number | | Beneficial Interests |
| 28 | | 10,000 |
| Las Animas Mining and Milling Company | | |
| (not incorporated) | | |
| A Common Law Trust | | |

This Certifies That J. MacDonald, is the holder of Ten Thousand Beneficial interests in the Las Animas Mining and Milling Company, fully paid and non-assessable, subject to Declaration of Trust, creating said Las Animas Mining and Milling Company, dated May 4, 1925, and recorded July 23, 1925, in the Recorder's Office of Cook County, Illinois, and transferable only on the books of the Trustees in person or by Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, the Trustees have issued this Certificate on this the 24th day of October, A. D. 1925.

Las Animas Mining and Milling Company
By Hilton Denney and
President of the Board of Trustees

(Seal)
Attest:
Roy S. Pipes,
Secretary

Interest
\$1.00
Each"

The evidence shows that this certificate bears the signatures of the defendants Denney and Pipes. There is no other evidence in the record concerning this certificate than what we have stated.

The defendants contend, inter alia, that the People failed to make out a prima facie case against them in the instant case, and after a careful study of the record we find that there is merit in this contention. The common law trust in question was organized May 4, 1925. The certificate to MacDonald was issued October 24, 1925, and it was actually handed to him by Larsen on January 16, 1926. The gravamen of the charge in the information lies in the selling or offering to sell the certificate in question to MacDonald without compliance with the Illinois Securities Law. There is no evidence in the case that proves or tends to prove that the defendants or either of them, in person

or by any agent, after the formation of the common law trust offered for sale or sold to MacDonald the certificate in question, or that they authorized, aided or assisted the Las Animas Mining and Milling Company in the unlawful sale of said certificate. The People contend that the evidence with respect to the assignment of October 14, 1924, and the payment by MacDonald of \$750 in connection therewith, taken in connection with the delivery to MacDonald of the certificate of October 24, 1925, makes out a prima facie case. We cannot agree with this contention. The assignment in question was executed nearly seven months before the organization of the common law trust; the \$750 was paid four months before the organization of the trust. The assignment of the one unit from the defendant Ray to MacDonald was based upon the agreement between Ray and DuBois and Ballard. After the making of the assignment and prior to the organization of the trust estate the contract between DuBois and Ray and Ballard was cancelled, as was also the lease from Thornton to DuBois and Ray. In our judgment, the proof as to the assignment of October 14, 1924, and the giving of the check for \$750 by Larsen is not competent evidence tending to prove the charge contained in the instant information. It follows, if we are right in our judgment, that the People failed to make out a prima facie case.

The judgment of the Municipal Court of Chicago in the instant case, No. 32154, must therefore be reversed and the cause remanded.

As to case No. 32155, the defendants contend, inter alia, that the proof for the People shows that the entire transaction in relation to the sale to the complaining witness, Bowers, occurred in Oak Park, Cook County, Illinois, and beyond the corporate limits of the City of Chicago, and that as the

or by any agent, after the formation of the common law trust
offered for sale or sold to Macdonald the certificate in question,
or that they authorized, aided or assisted the law firm in doing
and selling company in the interest sale of said certificate.
The parties contend that the evidence with respect to the assign-
ment of October 14, 1904, and the payment by Macdonald of \$750
in connection therewith, taken in connection with the delivery
to Macdonald of the certificate of October 22, 1904, makes out
a prima facie case. We cannot agree with this contention. The
assignment in question was executed nearly seven months before the
organization of the common law trust; the \$750 was paid four months
before the organization of the trust. The assignment of the one
was from the defendant Ray to Macdonald and was based upon the agree-
ment between Ray and Hobbs and Hafford. After the making of the
assignment and prior to the organization of the trust estate the
contract between Hobbs and Ray and Hafford was cancelled, as was
also the issue from Thomson to Hobbs and Ray. In our judgment,
the proof as to the assignment of October 14, 1904, and the giving
of the check for \$750 by Macdonald is not competent evidence tending
to prove the charge made in the instant information. It
follows, it we are right in our judgment, that the people failed
to make out a prima facie case.
The judgment of the Municipal Court of Chicago in the
instant case, No. 33184, must therefore be reversed and the
case remanded.
As to case No. 33185, the defendant contends, inter
alia, that the proof for the people shows that the entire
transaction in relation to the sale to the complaining witness,
Bowers, occurred in Oak Park, Cook County, Illinois, and beyond
the corporate limits of the City of Chicago, and that as the

Municipal Court of Chicago has no jurisdiction to impose penalties in criminal actions committed beyond the territorial limits of the City of Chicago it had no jurisdiction to try the defendants in the instant case; that there is a substantial and fatal variance between the pleadings and the proof in that the information alleges that the offense in question occurred in the City of Chicago, whereas the uncontradicted proof shows that it occurred in Oak Park, Cook County, Illinois. Counsel for the People admit that the entire transaction charged in the instant information took place in Oak Park, Illinois, and beyond the limits of the City of Chicago, and it is apparent from their arguments that they have serious doubts as to whether the conviction in the instant case can be sustained. In the fourth count the defendants are charged with selling "to A. C. Sowers, and to divers other persons whose names are at the present time unknown" (italics ours), and counsel for the People say that the evidence shows that the defendants sold to persons not specifically mentioned in the information in the City of Chicago, securities of the common law trust, and they ask us to determine if the case of The People v. Love, 310 Ill. 553, is an authority that would support the conviction under the instant information and under such proof. We can find nothing in the opinion in the case cited that would warrant us in answering the question in the affirmative. In the part of the opinion called to our attention by the counsel, the court merely holds that evidence of transactions of the defendants in that case concerning sales of stock other than the sale to the complaining witness was admissible for the reason that paragraph 1 of section 5 of the act exempts isolated sales, and the evidence was competent to show that the sale charged was not an isolated one. The language in the fourth count,

Municipal Court of Chicago had no jurisdiction to impose penalties in criminal actions committed beyond the territorial limits of the City of Chicago; it had no jurisdiction to try the defendant in the instant case; that there is a substantial and fatal variance between the plea and the proof in that the information alleges that the offense in question occurred in the City of Chicago, whereas the uncontroverted proof shows that it occurred in Oak Park, Cook County, Illinois. Counsel for the People admit that the entire transaction charged in the instant information took place in Oak Park, Illinois, and beyond the limits of the City of Chicago, and it is apparent from their statements that they have serious doubts as to whether the same violation in the instant case can be established. In the fourth count the defendant was charged with calling "to A. C. Edwards" and a direct appeal was taken to the Court on the ground that the defendant (Edwards) and counsel for the People say that the evidence shows that the defendant said he persons not specifically mentioned in the information in the City of Chicago, associates of the common law firm, and they ask us to determine if the case of People v. Love, 111 Ill. 582, is an authority that would support the conviction under the instant information and under such proof. It can find nothing in the opinion in the case cited that would warrant us in answering the question in the affirmative. In the part of the opinion cited to our attention by the counsel, the court merely holds that evidence of transactions of the defendant in that case concerning sales of stock after their sale to the complaining witness was inadmissible for the reason that paragraph 1 of section 2 of the act regarding isolated sales and the evidence was competent to show that the sale charged was not an isolated one. The language in the fourth count

that is relied upon by the counsel for the People, was intended by the pleader merely to negative the exemptions enumerated in section 5 of the statute. It was at first thought that such an allegation was necessary, but the Supreme Court, in The People v. Love, supra, (p. 567), held that it was not necessary in an indictment under the act in question, to negative the said exemptions, as that is a matter of defense. It is fundamental law that a defendant in an indictment or information must be charged with a specific offense and that the prosecution must prove the offense as charged. Proof of a separate and distinct offense, in lieu of the one charged, would not warrant a conviction, even though the defendant consented to be tried for the separate and distinct offense. The People in case No. 32155 charged that the venue of the offense was in the City of Chicago. This was a material allegation and the evidence fails to sustain it. Moreover, the proof shows that the offense charged was committed without the territorial limits of the City of Chicago and therefore the Municipal Court of Chicago was without jurisdiction to try the defendant for the offense shown to have been committed by the proof. (Miller v. The People, 230 Ill. 65.)

The judgment in the instant case, No. 32154, will be reversed and the cause will be remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

that is relied upon by the Government for the People, was intended
by the Government merely to negative the exemption contained in
section 3 of the statute. It was at first thought that such an
allegation was necessary, but the Supreme Court, in The People v.
John. Smith, (N. 887), held that it was not necessary in an
indictment under the act in question, to negative the said
exemption, as that is a matter of defense. It is fundamental
law that a defendant in an indictment or information must be
charged with a specific offense and that the prosecution must
prove the offense as charged. Proof of a separate and distinct
offense, in lieu of the one charged, would not warrant a con-
viction, even though the defendant consents to be tried for
the separate and distinct offense. The People in case No. 33185
admit that the venue of the offense was in the City of Chicago.
This was a material allegation and the Government failed to prove
it. Therefore, the indictment is defective and the defendant was
committed without the territorial limits of the City of Chicago
and therefore the Municipal Court of Chicago was without juris-
diction to try the defendant for the offense shown to have been
committed by him prior. Miller v. The People, 230 Ill. 68.
The judgment in the instant case, No. 33185, will be
reversed and the cause will be remanded.
FORWARDED AND RECORDED.
Barnes, P. J., and Cridley, J., concur.

246 I.A. 654

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Robert E. Crowe, State's
Attorney,
Defendant in Error,

v.

MILTON BENNY and GEORGE W. RAY,
Plaintiffs in Error,

Impleaded with Roy S. Pipes and
Walter T. Larsen.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 32154, People of the State of Illinois, ex rel. Robert E. Crowe, State's Attorney, v. Milton Benny and George W. Ray, Impleaded with Roy S. Pipes and Walter T. Larsen, in which we have this day filed an opinion, and in which opinion the information and material facts in the instant case are fully stated, and we have therein set forth our reasons and conclusions touching the matters involved in the appeal in the instant case, and for the reasons stated in that opinion, the judgment of the Municipal Court of Chicago in the instant case (No. 32155) is reversed.

REVERSED.

Barnes, P. J., and Gridley, J., concur.

PEOPLE OF THE STATE OF ILLINOIS
vs. ROBERT E. GROSS, Plaintiff
Defendant in Error.
v.
MILTON BENNY and GEORGE W. HAY,
Plaintiffs in Error.
Indorsed with Roy E. Wiles and
Walter T. Hansen.

MR. JUSTICE BRADMAN DELIVERED THE OPINION OF THE COURT.
This case was consolidated for hearing with case No.
2152, which is now on appeal to this court.
The facts of the case are as follows: The plaintiff in error
in the first case, Milton Benny and George W. Hay, were
indicted for the same offense as the defendant in error
in the second case, Robert E. Gross, and were
tried and convicted in the same court. The
indictment and material facts in the instant case are fully
set forth in the opinion, and we have thought not worth our trouble and
expense to repeat them here. The matters involved in the appeal in
the instant case, and for the reasons stated in that opinion,
the judgment of the Municipal Court of Chicago in the instant
case (No. 2152) is reversed.

226 - 34167

JAMES TINLEY,
Appellee,

v.

MORRIS J. GOLDBSTEIN and
SAMUEL J. VISON,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

James Tinley, plaintiff, sued Morris J. Goldstein and Samuel J. Vison, defendants, in the Municipal Court of Chicago in an action of the first class. The case was heard by the court without a jury and there was a finding for the plaintiff and his damages were assessed at the sum of \$4110. Judgment was entered on the finding and this appeal followed.

The plaintiff was a real estate broker and sued to recover commissions alleged to be due him from the defendants. The defendants were the owners of a twenty-four-apartment building located at 4944-4954 North Kimball avenue, Chicago. This property was subject to a first mortgage of \$80,000 and to a second mortgage of \$30,000. In the month of September, 1924, the defendants listed the property with the plaintiff; also with three or four other real estate brokers, one of whom was A. Wexler & Company. Herman Landfield was the owner of two vacant lots, one located on Kedzie avenue and another on Lawrence avenue, and also owned certain first and second mortgages. He wished to exchange his real estate and mortgages for other real estate and he listed his properties and securities with a number of real estate brokers, one of whom was the plaintiff and another was the said company. That the plaintiff tried to

243 T.A. 654

APPEAL FROM THE DECISION
OF THE COURT OF CHICAGO

APPEAL

V.

WILLIAM J. GOLDBERG and
WILLIAM J. GOLDBERG

THE JUDGE HAS DELIVERED THE OPINION OF THE COURT.

James Tinsley, plaintiff, and William J. Goldberg and
William J. Goldberg, defendants, in the within-entitled cause is
an action of law for recovery of the sum of \$100,000 and
costs thereof and there was a finding for the plaintiff
and his attorneys were awarded the sum of \$100,000 and
costs thereof on the 14th day of May, 1934.
The plaintiff was a real estate broker and was in
business with the defendant at the time of the
defendant's alleged to be due him from the defendant.
The defendant was the owner of a twenty-four apartment
building located at 1844-1846 North Kimball Avenue, Chicago.
This property was subject to a first mortgage of \$50,000 and to
a second mortgage of \$50,000. In the month of September, 1934,
the defendant listed the property with the plaintiff also
with three or four other real estate brokers, one of whom was
A. Barker & Company. Barker & Company was the owner of two
vacant lots, one located on North Avenue and another on
Lawrence Avenue, and also owned certain land and several mortgages.
He wished to exchange his real estate and mortgages for other
real estate and he listed his properties and mortgages with a
number of real estate brokers, one of whom was the plaintiff
and another was the said company. That the plaintiff acted to

make a deal between the defendants and Landfield is undisputed. The defendants claimed that the plaintiff in March, 1925, abandoned all efforts to bring about a deal between the said parties and that thereupon A. Wexler, of A. Wexler & Company, who was well acquainted with the defendants and Landfield, took up the matter and finally succeeded in bringing about a contract between them, but upon essentially different terms from those that the plaintiff had used in his negotiations. The plaintiff denied that he abandoned his efforts to bring about a deal between the parties, and he claimed that he was the broker who brought the defendants into communication with Landfield and that he was continuing his efforts to consummate a deal between them when the defendants, for the purpose of defrauding him of his commissions, used A. Wexler & Company as a mere dummy to close the deal between the parties. That A. Wexler & Company negotiated the written contract and consummated the deal between the parties is admitted, and that the defendants paid that company a commission for its services in the matter is not disputed.

The defendants contend that "the attitude of the Court throughout the trial of the case was biased, and the defendants did not receive a fair and impartial trial." After a careful study of the record, we regret to state that in our judgment this contention is meritorious. The court, without the slightest justification, on a number of occasions criticized severely the conduct of the counsel for the defendants, and it is clear from the record that the court throughout the trial showed a pronounced bias in favor of the plaintiff.

The defendants contend that the trial court erred in admitting in evidence plaintiff's exhibits three and four over their objection. The written agreement between the defendants

make a deal between the defendant and plaintiff is undisputed.

The defendant claims that the plaintiff in March, 1933,

abandoned all efforts to bring about a deal between the said

parties and that thereafter A. Werler, of A. Werler & Company,

who was well acquainted with the defendant and plaintiff, took

up the matter and finally succeeded in bringing about a contract

between them, but upon essentially different terms from those

that the plaintiff had used in his negotiations. The plaintiff

denies that he abandoned his efforts to bring about a deal between

the parties, and he claims that he was the broker who brought

the defendant into communication with plaintiff and that he was

terminating his efforts to consummate a deal between them when

the defendant, for the purpose of obtaining him as his commission

used A. Werler & Company as a mere dummy to close the deal between

the parties. That A. Werler & Company negotiated the written

contract and consummated the deal between the parties is undisputed.

and that the defendant paid that company a commission for its

services in the matter is not disputed.

The defendant contends that "the attitude of the court

throughout the trial of the case was biased, and the defendant

did not receive a fair and impartial trial." After a careful study

of the record, we regret to state that in our judgment this con-

clusion is mistaken. The court, without the slightest justifi-

cation, on a number of occasions criticized severely the conduct

of the counsel for the defendant, and it is clear from the record

that the court throughout the trial showed a pronounced bias in

favor of the plaintiff.

The defendant contends that the trial court erred in

admission in evidence plaintiff's exhibits three and four over

their objection. The written agreement between the defendant

and Landfield was drawn on April 11, 1925, and the deal was consummated on the 18th or 19th of April, 1925. Plaintiff's exhibit three is a carbon copy of a letter that the plaintiff claims was mailed to the defendant Vihon on April 29, 1925, and plaintiff's exhibit four is a carbon copy of a letter that the plaintiff claims was mailed to the defendant Goldstein on the same date. The defendants objected to the introduction of these letters on the ground that they were self-serving, but the court overruled the objection and admitted the exhibits in evidence. Each of these contained (inter alia) the following: "Mr. Herman Landfield has notified us that he has purchased your building, at the above address from you, which we submitted to him on March 26, 1925 (and notified you to that effect), giving as part payment mortgages and properties (as per the list submitted to you, in this office, on April 6, 1925) and that this office is entitled to our commission on the sale." These letters, written after the rights of the plaintiff, if any, had been determined, contained self-serving declarations that related to controverted questions of fact, and therefore should not have been admitted in evidence.

The defendants attempted to prove by Texler, the real estate broker who consummated the deal between Landfield and the defendants, that he, Texler, was the procuring cause of the sale to Landfield. The court at first, on objection by the counsel for the plaintiff, refused to allow the defendants to make the desired proof. From the statements made by the court it is apparent that he was very strongly of the opinion that the evidence offered was not admissible; in fact, the counsel for the defendants was rebuked by the court for stating what he wished to prove. The court finally said that while he did not think the evidence was admissible that he would let the witness "tell his story" to prevent any

and defendant was shown on April 11, 1958, and the same was
 transmitted on the 15th of April, 1958. Plaintiff's
 Exhibit three is a carbon copy of a letter that the plaintiff
 claims was mailed to the defendant on April 20, 1958, and
 plaintiff's Exhibit four is a carbon copy of a letter that the
 plaintiff claims was mailed to the defendant on April 20, 1958.
 The defendant objected to the introduction of
 these letters on the ground that they were self-serving, but
 the court overruled the objection and admitted the exhibits in
 evidence. Each of these exhibits (Exhibits 3 and 4) was
 admitted. Plaintiff has testified that he has purchased
 your building, at the above address from you, which we submitted
 to him on March 28, 1958 (and mailed you on that date), giving
 us part payment mortgage and promissory note for the full and
 value to you, in this office, on April 2, 1958) and that this
 office is entitled to our commission on the sale. These letters,
 written after the signing of the plaintiff, it may, but have
 determined, contained self-serving statements that related to
 admitted questions at that, and therefore should not have
 been admitted in evidence.
 The defendant's objection to these by letter, the court
 also notes the defendant's objection to these by letter, the court
 determined, that is, letter, was the preceding cause of the sale
 as admitted. The court at first, on objection by the defendant for
 the plaintiff, refused to allow the defendant to have the letters
 read. From the statements made by the court it is apparent that
 he was very strongly of the opinion that the evidence offered was
 not admissible in that, the court for the defendant can re-
 fused by the court for finding that he wished to prove. The court
 finally said that while he did not think the evidence was admissible
 that he would let the witness "tell his story" to prevent any

error in the record. The witness was then allowed to give his testimony, but the defendants contend, and we think with some reason, that it is apparent from a reading of the transcript that the trial court gave no consideration to this testimony and allowed it to be given for the mere purpose of preventing error in the record. The testimony in question was clearly relevant to the issues involved (see Godshaw v. Schindler, Gen. No. 31510, Ill. App. Ct., and cases cited therein), and it was highly important that the court should have fairly and impartially considered the evidence. We are disposed, in the present case, to give serious consideration to the instant complaint of the defendants because of the general attitude of the court in the matter of receiving competent evidence sought to be adduced by the defendants. To illustrate: When the counsel for the defendants was cross-examining an important witness for the plaintiff on matters germane to the evidence on direct, the court stated that the counsel was rambling and attempting to put in "a lot of stuff" that was inadmissible, but rather than have any possible error in the record, and to prevent the defendants from taking advantage of the point, he would allow the questions to be answered. On another occasion, when one of the defendants was on the stand and had given competent evidence, the court stated that the evidence had nothing to do with the issues and if the case were being tried by a jury he would strike it out and instruct the jury to disregard it, but that as the case was being tried by the court he would let it stand. It would seem as though much of the evidence introduced by the defendants was admitted by the court solely for the purpose of avoiding error on appeal.

The defendants cite a number of other instances in support of their contention that the court showed bias against the defendants, but we do not deem it necessary to refer to these.

error in the record. The witness was then allowed to give his testimony, but the court, in its opinion, was of the opinion that it is apparent from a reading of the transcript that the trial court gave no consideration to this testimony and allowed it to be given for the mere purpose of proving error in the record. The testimony in question was clearly relevant to the issues involved (see Johnson v. Johnson, 111 Cal. 2d 111, 112, 113, 114, and cases cited therein), and it was highly important that the court should have fairly and impartially considered the evidence we are disposed, in the present case, to give serious consideration to the instant complaint of the defendant because of the general attitude of the court in the matter of receiving competent evidence sought to be introduced by the defendant. To illustrate: When the counsel for the defendant was cross-examining an important witness for the plaintiff on matters germane to the witness on direct, the court stated that the counsel was rambling and attempting to put in "a lot of stuff" that was immaterial, but rather than have any possible error in the record, and to prevent the defendant from taking advantage of the point, he would allow the question to be answered. On another occasion, when one of the defendant's was on the stand and had given competent evidence, the court stated that the witness had nothing to do with the issues and it was not being asked by a jury he would decide it out and instruct the jury to disregard it, but that on the same day being tried by the court he would let it stand. It would seem as though much of the evidence introduced by the defendant was admitted by the court solely for the purpose of creating error on appeal.

The defendant cites a number of other instances in support of their contention that the court should have against the defendant, but we do not deem it necessary to refer to these.

The defendants urge a number of other points why the judgment should be reversed, but in our view of the case it is not necessary to consider any of these.

As this case must be tried again, we purposely refrain from analyzing and commenting on the evidence. We are satisfied, however, after a careful study of the record, that, under all the proof, this is not a case where the present judgment could be sustained, notwithstanding the errors committed by the trial court. The defendants have not had a fair and impartial trial and the judgment of the Municipal Court of Chicago should be and it is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

The defendant's wife a number of other points why the
judgment should be reversed, but in any view of the case it is
not necessary to consider any of these.

It is this case must be tried again, we purposely refrain
from analyzing and commenting on the evidence. We are satisfied,
however, after a careful study of the record, that under all the
facts, this is not a case where the present judgment could be
sustained, notwithstanding the errors committed by the trial court.
The defendant has not had a fair and impartial trial and the
judgment of the Circuit Court of Chicago should be and is in
reversed and the case is remanded.

Respectfully,
J. L. and Elizabeth J. ...

SAMUEL R. RUBY,
Appellant.

v.

ANAKIN LOCK & ALARM
COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for costs entered by the Municipal Court of Chicago in favor of the defendant, Anakin Lock & Alarm Company, a corporation, and against the plaintiff, Samuel R. Ruby. The case was tried by the court without a jury. The plaintiff sued to recover back from the defendant the principal sum of \$1000 and accrued interest, which sum he had deposited with the defendant, on June 30, 1923, in accordance with the terms of a written contract executed by the parties on that date.

This cause, upon a prior judgment, was reviewed by this court in Ruby v. Anakin Lock & Alarm Company, 241 Ill. App. 613, and it appears from the opinion filed that a second amended statement of claim of the plaintiff was, on motion of the defendant, stricken from the files, and upon the plaintiff electing to stand by the statement of claim, the trial court entered judgment against him for costs, from which judgment the plaintiff appealed. This court held on that appeal that the plaintiff's statement of claim stated a cause of action, and the judgment of the Municipal Court was reversed and the cause remanded for further proceedings. As the former opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN SENATE
JANUARY 11, 1911
REPORT OF THE
COMMISSIONERS OF THE
LAND OFFICE

REPORT OF THE COMMISSIONERS OF THE LAND OFFICE

This is an appeal from a judgment for costs entered by the Honorable Court of Claims in favor of the defendant, American Land & Lumber Company, a corporation, and against the plaintiff, James H. Kelly. The case was tried by the court without a jury. The plaintiff used to recover back from the defendant the principal sum of \$1000 and accrued interest, which sum he had deposited with the defendant, on June 30, 1903, in accordance with the terms of a written contract executed by the parties on that date.

This case, upon a prior judgment, was reviewed by the court in James H. Kelly v. American Land & Lumber Company, 221 App. Div. 2d, and it appears from the opinion filed that a second amended statement of claim of the plaintiff was, on review of the defendant, returned from the files, and upon the plaintiff's election to stand by the statement of claim, the trial court entered judgment against him for costs, from which judgment the plaintiff appealed. This court held on that appeal that the plaintiff's statement of claim stated a cause of action, and the judgment of the Honorable Court was reversed and the case remanded for further proceedings. As the former opinion

states in detail the plaintiff's claim, as shown by his statement of claim, it is unnecessary to restate it here. The defendant, by its amended affidavit of merits, filed after the reversal of the former judgment, admitted the execution of the written contract set forth in plaintiff's statement of claim and admitted that the plaintiff deposited with it the sum of \$1000, as provided in the contract, and that said sum was to act as a part payment for the delivery to the plaintiff of the initial supply of \$4500 worth of products known as Anakin Locks and Alarms; and the defendant averred that the balance was to be paid on or before August 1, 1923; that the defendant was ready, willing and able at all times to deliver to the said plaintiff the said initial supply of its products, but that prior to August 1, 1923, the plaintiff notified the defendant that he would not carry out the contract and that he refused to abide by or be bound by its terms and refused to pay to the defendant the balance of the payment, \$3500, and demanded that the defendant return to him the \$1000; the defendant denied that it sustained no damage by reason of plaintiff's refusal to comply with the terms of the contract, and it alleged that it had sustained damages far in excess of the amount claimed by plaintiff; that the defendant had lost the sale of the initial supply of merchandise and the profits thereon, and that its profits on said initial supply of its merchandise so sold to plaintiff, after deducting all costs of manufacture and transportation, had the plaintiff carried out the terms of the contract, would have been \$1600; the defendant further alleged that by and under the terms of the contract it was obliged to and did pay out the sum of \$1000 for procuring the contract with the plaintiff, and that in order to procure another representative

stated in detail the plaintiff's claim, as shown by his state-
 ment of claim, it is unnecessary to recite it here. The
 defendant, by its amended affidavit of merits, filed after the
 reversal of the former judgment, admitted the execution of the
 written contract and took in plaintiff's statement of claim
 and admitted that he plaintiff deposited with it the sum of
 \$1000, as provided in the contract, and that said sum was to pay
 as a part payment for the delivery of the plaintiff of the initial
 supply of 10000 worth of products known as "Kaiser" and
 "Alamo" and the defendant admitted that the balance was to be paid
 on or before August 1, 1933; that the defendant was ready, willing
 and able at all times to deliver to the said plaintiff the said
 initial supply of its products, but that prior to August 1, 1933,
 the plaintiff notified the defendant that he would not accept any
 the contract and that he refused to abide by or be bound by the
 terms and agreed to pay to the defendant the balance of the
 payment, \$1000, and demanded that the defendant return to him the
 \$1000; the defendant denied that it sustained no damage by reason
 of plaintiff's refusal to abide with the terms of the contract,
 and it alleged that it had sustained damage for its expense of the
 money claimed by plaintiff; that the defendant had lost the said
 of the initial supply of products and the profits thereon, and
 that the profit on said initial supply of the products so sold
 to plaintiff, after deducting all costs of manufacture and
 transportation, had the plaintiff carried out the terms of the
 contract; would have been \$1000; the defendant further alleged
 that it had under the terms of the contract it was obliged to and
 did pay out the sum of \$1000 for procuring the contract with the
 plaintiff, and that in order to procure another representative

for the territory in question the defendant was obliged to and did expend, under the terms of the contract, the sum of \$1250; the defendant denied that by the terms of the contract the \$1000 was a penalty, and averred that it must be regarded as earnest money and to be forfeited as liquidated damages.

In the opinion of the trial court delivered at the conclusion of the evidence, he held that the evidence showed that the plaintiff did not perform the contract on his part and that he refused to carry out the same and that under the terms of the contract the \$1000 was to be considered as liquidated damages and not as a penalty, and that the defendant had the right to retain the \$1000. The court thereupon made a finding for the defendant upon which judgment was entered.

The plaintiff here contends "as a proposition of law that under the pleadings, the prior decision of the Appellate Court of Illinois, First District, in this cause, and under the evidence introduced, the money retained by the defendant was a penalty and not liquidated damages; therefore, the issue of the amount of damages was a question of fact. * * * that no competent proof of damages having been introduced by the defendant, the plaintiff made a prima facie case for recovery." It is entirely unnecessary for us to determine the question as to whether, under the terms of the contract, the \$1000 was a penalty or liquidated damages, as we are satisfied, after a careful consideration of the record, that it was proven by competent evidence that the defendant sustained damages in excess of \$1000 through the breach of the contract by the plaintiff.

The plaintiff contends that the contract in question was not binding between the parties; that it was void for lack

for the recovery in question the defendant was obliged to pay
the amount, under the terms of the contract, the sum of \$1000;
the defendant denied that by the terms of the contract the \$1000
was a penalty, and asserted that it must be regarded as a return
money and to be treated as liquidated damages.

In the opinion of the trial court delivered at the
conclusion of the evidence, he held that the evidence showed
that the plaintiff had not gotten the contract on his part and
that he returned to the defendant the sum of \$1000 under the terms
of the contract the \$1000 was to be considered as liquidated
damages and not as a penalty, and that the defendant had the
right to retain the \$1000. The court thereupon gave a ruling
in the defendant's favor which was entered.

The plaintiff here contends "as a question of law
that under the findings, the trial decision of the appellate
court of Illinois, First District, in this cause, and under the
well-known authorities, the money retained by the defendant was a
penalty and not liquidated damages; therefore, the issue of the
amount of damages was a question of fact." * * * that no
evidence that the damages having been introduced by the defendant,
and, the plaintiff made a prima facie case for recovery." It is

entirely unnecessary for us to determine the question as to
whether, under the terms of the contract, the \$1000 was a penalty
or a liquidated damages, as we are satisfied, after a careful
consideration of the record, that it was proven by competent
evidence that the defendant sustained damages in excess of \$1000
through the breach of the contract by the plaintiff.

The plaintiff contends that the contract in question
was not binding between the parties and that it was void for lack

of mutuality and for uncertainty in material provisions; that it was unfair, vague and indefinite. It is a sufficient answer to this contention to say that the record clearly discloses that the plaintiff in the trial court proceeded solely on the theory that the contract in question was a binding one between the parties, and, under a well established rule, the plaintiff cannot advance a theory of recovery in this court different from that presented in the trial court. (See Levy v. Standard Elevator Co., 236 Ill. 295; City of Chicago v. Wildman, 240 Ill. 415.)

The plaintiff next contends that there was no competent evidence tending to prove a breach of the contract by the plaintiff. We find no merit in this contention. The trial court found that the plaintiff did not perform the contract on his part and that he refused to carry out the same, and, in our judgment, competent evidence in the record fully sustains this finding.

We find no substantial error in the record, and the judgment of the Municipal Court of Chicago will be affirmed.

APPROVED.

Barnes, P. J., and Gridley, J., concur.

of materiality and for no reason in material fact; that it was unfair, vague and indefinite. It is a well-known maxim that this contention is not that the second circuit decision that the plaintiff in the trial court proceeded solely on the theory that the contract in question was a binding one between the parties, and, under a well established rule, the plaintiff cannot advance a theory of recovery in this court different from that presented in the trial court. (See Law v. Henshaw, 111 Ill. 205; City of Chicago v. Chicago & North Western Ry. Co., 111 Ill. 205.)

The plaintiff next contends that there was no competent evidence tending to prove a breach of the contract by the plaintiff. We find no merit in this contention. The trial court found that the plaintiff did not perform the contract on the part of the defendant to carry out the same, and, in the first place, the evidence in the record fully sustains this finding. We find no substantial error in the record, and the judgment of the trial court is affirmed.

AND ORDERED

That the judgment of the trial court be affirmed.

IT IS SO ORDERED.

WITNESSED my hand and seal of office at Chicago, Illinois, this 10th day of June, 1910.

F. X. OWENS, for use of
ARTHUR F. KENNEY,
Appellee,

v.

VIKING CHEMICAL CORPORATION,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Arthur F. Kenney, plaintiff in the court below, secured a judgment for \$250 in the Municipal Court of Chicago, against F. X. Owens. Thereafter the plaintiff caused to be issued a garnishee summons against the Viking Chemical Corporation, a corporation, the appellant here. The summons was returned as served "By order of Plaintiff's Attorney" upon "Miss G. Goodrow, Agt. of said corporation. * * * The president, secretary, superintendent, general agent or other officers of said corporation not found in the City of Chicago." A conditional judgment by default was entered against said corporation and a scire facias was then issued against it to show cause why the conditional judgment should not be confirmed and made final. Service of this writ was had upon the said garnishee by delivering a copy of the same to "Miss Goodrow, Agt. of said corporation * * * The President, Clerk, Secretary, Superintendent, General Agent, Cashier, Principal, Director, Engineer, Conductor or any other Agent of said corporation not found in the City of Chicago." Final judgment by default was then entered against the said garnishee, on January 10, 1927. On March 23, 1927, the garnishee presented a verified petition - supported by two affidavits -

to the court praying that the judgment against it be vacated, the execution stayed, and that it be granted leave to file its answer as garnishee. The petition was based upon Sec. 376, ch. 37, Smith-Hurd Ill. Rev. Stats., 1927, which provides that when thirty days have elapsed after the entry of a judgment "the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." (*Italics ours.*) The petition alleges that the garnishee summons, scire facias and execution were served upon stenographers employed by the petitioner; that the officer serving the writs made no inquiry at any time at the office of the petitioner respecting its president or other officers; that no attempt was made to serve the president; that the person serving the papers directed the stenographers on whom service was made to turn the papers over to F. K. Owens, the original debtor; that the stenographers did as they were told; that the said Owens informed none of the officers, directors or stockholders of the petitioner with respect to the said service, but instead concealed the fact of the suit and service of the papers from them; that the first information that any of the officers of the petitioner had respecting the action was contained in a letter from the attorney of the plaintiff that was received by the petitioner more than thirty days after the final judgment had been entered; that at the time of the alleged service the said Owens was a salaried employee of the Hallwien Chemical Corporation of Cincinnati, Ohio, whose products the petitioner was then purchasing, the same being resold by the petitioner in and around Chicago; that as such

salaried employee, and in order to stimulate sales of the Hallen products, the said Owens was permitted the use of an office and two stenographers employed by the petitioner, but that at no time was the said Owens an employee, salaried or unsalaried, of the petitioner; that for a time he had acted as an unsalaried secretary of the petitioner; that the president of the petitioner corporation was present in his office in Chicago during all of the business hours of December 3, 1926, the date of the service of the garnishee summons, and on January 6, 1927, the date of the service of the scire facias; that the petitioner never owed and does not ^{now} owe said Owens any money or property; that the debt, to recover which the action of the plaintiff was brought against said Owens, was a purely personal one of the said Owens; that the judgment entered by default against the petitioner should be vacated and the petitioner be given leave to file its answer as garnishee.

On April 14, 1927, the petition of the Viking Chemical Corporation came on for hearing before the court. Genevieve Goodrow testified that she was employed as a stenographer by the petitioner in December, 1926, and January, 1927; that she was no longer connected with the Viking Chemical Corporation; that the bailiff served the garnishee summons upon her December 3, 1926, and told her that she should give the same to Mr. Owens, and that she thereafter handed the summons to the latter; that two or three weeks thereafter another summons was served upon her by the bailiff and the latter told her to give the same to Mr. Owens, and she thereafter gave the same to the latter; that the bailiff said not a word to her about any officers of the corporation; that he just asked for Mr. Owens; that she notified no one else but Mr. Owens about the two papers served

retained employee, and in order to maintain sales of the
 Halston products, the said woman was permitted the use of an
 office and two stenographers employed by the petitioner, and
 that at no time was the said woman an employee, retained or
 associated, of the petitioner; that for a time he had noted an
 associated secretary of the petitioner; that the president of
 the petitioner corporation was present in his office in Chicago
 during all of the business hours of the said woman in 1937;
 at the meeting of the petitioner corporation held on January 14, 1937,
 the date of the meeting of the said woman, the petitioner

never owed and does not ^{now} owe said woman any money or property;
 and the debt, to recover which the action of the said woman
 was brought against said woman, was a purely personal one of the
 said woman; that the judgment entered by default against the
 petitioner should be vacated and the petitioner be given leave to
 file the answer as permitted.

On April 14, 1937, the petition of the Viking Chemical
 Corporation came on for hearing before the court. Defendant
 William A. Loomis, John, and January, 1937; that the man
 no longer connected with the Viking Chemical Corporation; that
 the bill of lading, the defendant presented upon December 21,
 1936, and said that said man should give the name as Mr. Loomis;
 and the defendant furnished the document to the factory; that
 two or three weeks thereafter another document was noted upon
 not by the bill of lading and the defendant gave the name to
 Mr. Loomis, and the defendant gave the name to the factory; that
 the bill of lading was a note to the factory; that the
 corporation; that he had not seen Mr. Loomis; that the
 bill of lading was not a note to the factory; that the

on her. Charlotte E. Fish testified that she was employed as a stenographer by the petitioner in December and January; that when the bailiff served a paper on her on February 16, 1927, he asked her if Mr. Owens was in town and she told him that he was out of town, and that thereupon the bailiff asked her to take the paper and see that Mr. Owens got it; that she sent it to Mr. Owens; that the bailiff said nothing about the president or officers of the company and that she said nothing about the service of the paper to any officers of the company. J. H. Harmon testified that he was president of the Viking Chemical Corporation; that he received no notice of any kind about the garnishee summons in the case; that the first that he heard concerning same was about March 15th; that he was in his office in Chicago on December 3, 1926, and on January 6, 1927; that the petitioner "owed Owens no money and had no property of any kind belonging to him; that it never paid him any salary, and never owed him a cent." Frank McCormick, a deputy sheriff of the Municipal Court, testified that he served the garnishee summons on the petitioner by leaving a copy of the same with Miss G. Goodrow on December 3, 1926; that he asked her if the president or any of the officers were in; that she replied that they were not; that he told her to give the summons to the president or some other officer of the corporation; that he served a motion on Miss Goodrow on January 6, 1927, and that "he made the same statement to her on that occasion as when he served the summons on December 3, 1926;" that he did not tell her to turn over the paper to Mr. Owens; that he was then serving from fifteen to twenty-five summonses a day and that when he served anyone he made a note of the name of the party served and the date of service, and that he made an entry in his book the next day as to the service; that

in fact, Charles E. Wick testified that she was employed as a stenographer by the petitioner in December and January; that when the billit served a paper on her on February 16, 1937, he asked her if Mr. Owens was in town and she told him that he was in town, and that thereupon the billit asked her to take the paper and see that Mr. Owens got it; that she went to Mr. Owens; that the billit said nothing about the president or officers of the company and that she said nothing about the service of the paper to any officers of the company. J. H. Harmon testified that he was president of the Viking Chemical Corporation; that he received no notice of any kind about the summons in the case; that the first that he heard concerning same was about March 1, 1937, that he was in his office in Chicago on December 5, 1936, and on January 6, 1937; that the petitioner "owed Owens no money and had no property of any kind belonging to him; that it never paid him any salary, and never owed him a cent." Frank McCormick, deputy sheriff of the Municipal Court, testified that he served the summons on the petitioner by leaving a copy of the same with Miss G. Cooper on December 5, 1936; that he asked her if the president or any of the officers were in; that she replied that they were not; that he told her to give the summons to the president or some other officer of the corporation; that he served a motion on Miss Cooper on January 6, 1937, and that "he made the same statement to her on that occasion as when he served the summons on December 5, 1936"; that he did not tell her to turn over the paper to Mr. Owens; that he was then serving from fifteen to twenty-five hundred a day and that when he served anyone he made a note of the name of the party served and the date of service, and that he made an entry in his book the next day as to the service; that

as weeks go by he probably forgets the circumstances of the service; that there was nothing in particular about the service in this case that would cause him to remember the circumstances of the same, "only the record in the book;" that he had no independent recollection as to the practice he followed at the time of making the service; that he testified as he did simply because he thought he had followed his ordinary routine on the occasion in question; that he did not know where any of the officers were and did not ask where they were; that he did not ask where the president or any other officer of the petitioner could be found at the time because his instructions were to serve an employee if the president or any other officer "was not there." At the conclusion of the evidence the trial court stated that he was of the opinion that the service was proper and he thereupon overruled the motion of the petitioner to vacate the judgment. This appeal followed. The appellee has not filed an appearance or a brief in this court.

"The return of an officer to a writ, is only prima facie evidence of the facts stated by it; in a proper case made, equity will relieve against the effects of it." (Owens v. Hanstead, 22 Ill. 161.) "It has long been the settled rule of this State that a court of equity will relieve against the effects of a false return of an officer, and that a judgment obtained by means of such a return, without any notice to the defendant, will be set aside where third parties have not acquired rights on the faith of the return and there is equitable ground for granting the relief. Where a court has assumed jurisdiction of a defendant on the strength of a false return of service of process by an officer, if the judgment is inequitable and unjust it will be relieved against in equity. Owens v. Hanstead, 22 Ill. 161; O'Connor v. Wilson, 57 id. 226; Hickey v. Stone, 60 id. 458; Davis v. Dresback, 31 id. 393;

as before as by the probably correct the circumstances of the case
which that there was nothing in particular about the service in
this case that would make it a landmark in the history of
the same, "only the record in the case" that he had no independent
recollection as to the precise he followed at the time of making
the entry; that he recalled as he did simply because he thought
he had followed his ordinary routine on the occasion in question;
that he did not know where any of the officers were and did not ask
where they were; that he did not know the position of any
other officer of the battalion could be found at the time because
his battalion was at that time in a position to the right of the
other officer "was not there." At the conclusion of the evidence
the trial court stated that he was of the opinion that the service
was proper and he thereupon overruled the motion of the petitioner
to vacate the judgment. This appeal followed. The appellee has
not filed an appearance or a brief in this court.
The record of an officer as a wife, is only given
in the evidence of the facts stated by it; in a proper case made,
equally will relieve against the effects of it." (Harris v. Harris, 1
to 111, 101.) "It has long been the settled rule of this State
that a copy of equity will relieve against the effects of a false
return of an officer, and that a judgment obtained by means of
such a return, will be set aside on the determination. Will be set
aside where there shall have not occurred within on the relief
of the return and there is no evidence against the relief.
Here a court has assumed jurisdiction of a return on the assumption
of a false return of service of process by an officer. If the judg-
ment is improvident and unjust it will be relieved against in equity."
Harris v. Harris, 101 Ill. 101. O'Connor v. O'Connor, 101 Ill. 101.
Harris v. Harris, 101 Ill. 101. Harris v. Harris, 101 Ill. 101.

Cassidy v. Automatic Time Stamp Co., 135 id. 431." (Good v. City of Peoria, 371 Ill. 173, 177.) If the return is false and the defendant is thereby prevented from setting up a good defense, he has a remedy against the bailiff by an action for the false return, or he may file a bill in equity against the plaintiff.

(Marabia v. The Mary Thompson Hospital, 309 Ill. 147, 156.)

See also St. Louis & Sandoval Coal and Mining Co. v. Edwards et al., 103 Ill. 472, where service was had upon a director of the corporation who had been joined as a party complainant in the action. The Supreme Court held such service void.

"Section 8 of the Practice Act provides that an incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county in which the suit is brought, and if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, etc. Service must be had on the president, if he can be found in the county. If he cannot be found then it may be had on some other officer mentioned in the statute.

(Goodpaster v. Chicago, Milwaukee & Gary R. Co., 240 Ill. App. 267, and cases cited.) The several returns of the bailiff that "The president, secretary, superintendent, general agent or other officers of said corporation not found in the City of Chicago," is equivalent to a return that the said officers could not be found in the City of Chicago. (Chapman v. North Am. Ins. Co., 292 Ill. 179.)

It is fairly clear from the testimony of the bailiff that he made no real effort to serve the president or one of the other officers of the defendant corporation nor did he attempt to ascertain if they could be found. Under such

Exhibit 7, Memorandum of Understanding, dated 10/1/77, between the

City of Chicago and the Chicago Police Department, dated 10/1/77.

The defendant is hereby prevented from asserting a good defense. He has a remedy against the plaintiff by an action for the return of the property or by way of a writ in equity against the plaintiff.

Exhibit 7, Memorandum of Understanding, dated 10/1/77, between the

City of Chicago and the Chicago Police Department, dated 10/1/77.

The City of Chicago, hereby certifies that the defendant is the

person who was arrested on 10/1/77 and who was taken to the

station. The station is the Chicago Police Department.

"Section 2 of the Chicago Police Department Act provides that

any person who is arrested shall be taken to the station and

shall be held there until he is released or until he is taken to the

court in which he was arrested. The City of Chicago hereby certifies

that the defendant was taken to the station and held there until he

was released. It is the policy of the City of Chicago to release

any person who is arrested and held there until he is released.

(Exhibit 7, Memorandum of Understanding, dated 10/1/77, between the

City of Chicago and the Chicago Police Department, dated 10/1/77.)

The defendant, Memorandum of Understanding, dated 10/1/77, between the City of Chicago and the Chicago Police Department, dated 10/1/77.

It is the policy of the City of Chicago to release any person who is

arrested and held there until he is released. (Exhibit 7, Memorandum of Understanding, dated 10/1/77, between the

City of Chicago and the Chicago Police Department, dated 10/1/77.)

It is hereby agreed that the defendant is the person who was

arrested on 10/1/77 and who was taken to the station and held there

until he was released. The City of Chicago hereby certifies that

the defendant was taken to the station and held there until he was

circumstances his return was false. It is apparent that his testimony in reference to the service of the several writs in the instant case was based upon the assumption that he had followed the routine that he ordinarily practised in similar cases and that he had no independent recollection as to what actually occurred at the time of the service of the said writs. On the other hand, Miss Goodrow and Miss Fish testified positively that the bailiff told them to give the papers to Mr. Owens and that he said not a word about the president or other officers of the company. The bailiff made many services each day, but for Miss Goodrow and Miss Fish the matter of the service was an unusual circumstance and likely to be impressed upon their memories. Mr. Owens was the judgment debtor in the original action and his interest in the matter might well tend to cause him to conceal the fact of the service of the writs in the garnishment proceedings from the president and other officers of the corporation, and if the testimony of Miss Goodrow and Miss Fish is to be believed, and we see no reasonable grounds for doubting the same, the bailiff told them to give the writs to Owens and they did so, and the president of the garnishee corporation testified that Owens concealed from the officers of the corporation the fact of the service of the writs. If the bailiff told Miss Goodrow and Miss Fish to give the writs to Owens and they did so, and if Owens concealed from the officers of the corporation the fact of the service of the writs, it is doubtful, to say the least, in view of the decision of the court in St. Louis & Landoval Coal and Mining Co. v. Edwards et al., supra, if such a service would be a valid one in the instant case. In any event, under such circumstances, the returns of the bailiff would not speak the truth.

circumstances this person was taken. It is apparent that this testimony in reference to the service of the several wives in the instant case was based upon the assumption that he had followed the routine that he ordinarily practiced in similar cases and that he had no independent recollection as to what actually occurred at the time of the service of his said wife. On the other hand, Miss Goodrow and Miss Tish testified positively that the bailiff told them to give the papers to Mr. Owens and that he said not a word about the procedure or other officers of the company. The bailiff made many services each day, but for Miss Goodrow and Miss Tish the matter of the service was an unusual circumstance and likely to be impressed upon their memories. Mr. Owens was the judgment debtor in the original action and his interest in the matter might well tend to cause him to connect the fact of the service of the wife in the instant proceeding from the president and other officers of the corporation, and if the testimony of Miss Goodrow and Miss Tish is to be believed, and we see no reasonable grounds for doubting the same, the bailiff told them to give the wife to Owens and they did so, and the president of the corporation testified that Owens contacted from the officers of the corporation the fact of the service of the wife. If the bailiff told Miss Goodrow and Miss Tish to give the wife to Owens and they did so, it is in doubt, it is doubtful, to say the least, in view of the decision of the court in St. Louis & Southern Railway Co. v. Edwards, 100 Mo. 241, 12 S.W. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

We feel satisfied, especially in view of the fact that third parties have not acquired rights on the faith of the return of the bailiff, and as a good defense on the merits is shown by the petition, and as the petitioner is merely asking to have the default set aside and that it be allowed to answer, that justice will be served by granting the prayer of the petitioner.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to the court to set aside the judgment against the Viking Chemical Corporation, a corporation, and to allow it to file its answer as garnishee.

REVEREND AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Gridley, J., concur.

...the fact established, especially in view of the fact

that said parties have not recognized rights on the fact

of the return of the bill, and as a good balance on the

matter is shown by the petition, and as the petitioner in

merely asking to have the bill set aside and that it be

allowed to answer, that justice will be served by granting

the prayer of the petitioner.

...The judgment of the Municipal Court of Chicago is

reversed and the cause is remanded with directions to the

court to set aside the judgment against the Viking Chemical

corporation, a corporation, and to allow it to file its answer

as directed.

...REVEREND AND HONORABLE JUDGES.

...and Friday, 3... court.

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246 I.A. 655

289 - 32230

EDGAR LEWIS,
Appellee.

v.

MATTIE CLARK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Edgar Lewis, plaintiff, sued Mattie Clark, defendant, in the Municipal Court of Chicago in an action on contract. The plaintiff sued to recover upon five promissory judgment notes for \$130 each, and on April 16, 1926, judgment by confession was entered for \$1324.46. On September 3, 1926, the defendant filed an appearance and entered a motion to vacate and set aside the judgment and that the defendant be given leave to defend the cause of action on the merits. On October 8, 1926, an order was entered "that said judgment be opened, that leave be and hereby is given to the defendant to appear and make defense herein, that a trial of this cause be had notwithstanding said judgment, that said judgment stand as security and that execution herein be stayed until the further order of this court." On April 19, 1927, the cause was tried before the court without a jury and at the conclusion of the evidence the court entered the following finding: "The court finds that at the date of the rendition of the judgment by confession in this cause, there was due from the defendant, Mattie Clark, to the plaintiff the sum of \$1324.46." A motion for a new trial was overruled. Judgment was entered on the finding and this appeal followed.

3-10-1935

MR. JUSTICE ROSSAVAL DELIVERED THE OPINION OF THE COURT.

Defendant, Plaintiff, and Mollie Clark, defendant, is the Municipal Court of Chicago in an action on contract. The plaintiff sued to recover upon five promissory judgments notes for \$150 each, and on April 18, 1935, judgment by confession was entered for \$150.00. On September 3, 1935, the defendant filed an appearance and entered a motion to vacate and set aside the judgment and that the defendant be given leave to defend the cause at action on the merits. On October 3, 1935, an order was entered "that said judgment be opened, that leave be and hereby is given to the defendant to appear and make defense herein, that a trial of this cause be had notwithstanding said judgment, that said judgment stand as executory and that execution herein be stayed until the further order of this court." On April 19, 1937, the cause was tried before the court without a jury and at the conclusion of the evidence the court entered the following findings: "The court finds that at the date of the rendition of the judgments by confession in this cause, there was due from the defendant, Mollie Clark, to the plaintiff the sum of \$150.00." A motion for a new trial was overruled. Judgment was entered on the

finding and this signed following.

On December 20, 1937, on motion of the defendant, we struck from the record the bill of exceptions in the instant case. As the errors assigned are based entirely upon the bill of exceptions, the judgment of the Municipal Court of Chicago must be affirmed, and it is accordingly so ordered.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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 form of a Commission of the European Communities
 and the Commission of the European Communities
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 in the form of a Commission of the European
 Communities.

Commission of the European Communities

MARIE VOYD,
Appellee,

vs.

CALUMNET NATIONAL BANK,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE HATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff was a depositor in the savings department of the defendant bank. She alleged in her statement that on June 4, 1925, defendant charged her account improperly with \$170; that on June 23, 1925, defendant improperly charged her with the further sum of \$100, making a total amount claimed of \$270.

The affidavit of merits averred that the sums in each instance had been withdrawn by some person duly authorized. The cause was tried by the court. There was a finding for plaintiff and judgment for \$270. The defendant contends that the finding and judgment are against the manifest weight of the evidence and that the court erred in refusing to receive competent evidence offered in behalf of the defendant.

The plaintiff testified that she never authorized anybody to withdraw the money and did not know that it had been withdrawn; that she never received either amount when same were drawn. She also introduced in evidence her savings bank pass book, which shows deposits in different amounts and on different dates from July 16, 1924, to October 7, 1926. It also shows the withdrawals of June 4 and June 23, 1925, in controversy, and on the back of the savings bank book appear the "By-Laws Relating to Savings Deposits," which provide in substance that books shall be given to each depositor in which every deposit shall be entered; that no money shall be payable on account of the deposit unless

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EX - 1111

UNITED STATES DISTRICT COURT

OF THE DISTRICT OF COLUMBIA

CLERK OF COURT
U.S. DISTRICT COURT
WASHINGTON, D.C.

MR. FRANKLIN J. MURPHY
DELIVERED THE OPINION OF THE COURT

The plaintiff was a depositor in the savings department of the defendant bank. The alleged in her statement that on June 4, 1938, defendant charged her account improperly with \$170; and on June 25, 1938, defendant improperly charged her with the sum of \$200, making a total amount of about \$370.

The affidavit of merits averred that the sum in question had been withdrawn by some person duly authorized. The same was tried by the court. There was a finding for plaintiff and judgment for \$370. The defendant contends that the finding and judgment was against the manifest weight of the evidence and that the court erred in refusing to receive competent evidence of fact in behalf of the defendant.

The plaintiff testified that she never authorized anyone to withdraw the money and did not know that it had been withdrawn; that she never received either amount when same were paid. She also introduced in evidence her savings bank pass book, which shows deposits in the correct amounts and on different dates from July 16, 1934, to October 7, 1938. It also shows the withdrawals of June 4 and June 25, 1938, in controversy, and on the back of the savings bank book appears the "My Bank Relating to Savings Deposits," which provides in substance that books shall be given in each depositor in which every deposit shall be entered; that no money shall be payable on account of the deposit unless

the deposit book is presented. The by-laws state:

"The bank will not be responsible for payments to anyone presenting the deposit book without proper authority, unless notice shall have been given to the bank that the book is lost, stolen or in improper hands.

"Section 7-- All depositors in this department must give their unconditional assent to the by-laws and regulations of the bank relating to savings deposits by writing their names in a book to be kept for that purpose, which shall contain a copy of such by-laws and regulations."

On cross-examination it developed that on June 4, 1925, plaintiff was living with her mother, but plaintiff denied that on that date she asked her mother to get \$170 for her and denied that she at that time spoke to her mother about having her sister Anna do so. She stated, however, that at that time the pass book was "in my mother's hands. I had nothing to do with it. *** My mother kept it-- I don't know where she kept it."

Plaintiff's sister Anna testified that on June 4, 1925, she was living with other members of the family; that she then had a beauty parlor, but came to her mother's every evening; that on that evening she had a talk with the plaintiff; that plaintiff told her she wanted to get \$170 from the defendant bank and wanted the witness to go because her mother could not talk English. She says that plaintiff gave her the deposit book, taking it from under her pillow, and said, "You can go with mother;" that plaintiff also told her that the money in the bank was under the name of "Marie Voyd" and further that if they asked her age to say she was born in 1903. Anna says that the next morning she went to the bank and drew the money. She was asked to tell what she did at that time, but an objection was sustained by the court. She says that she gave the girl the book and identified the withdrawal slip which she signed and then received \$170. She says that she then went home with her mother and handed the money to plaintiff and went back to the shop; that plaintiff took the money and put it under her pillow.

As to the second withdrawal, the sister says that on

The deposit book is returned. The by-laws state:

"The bank will not be responsible for payments to anyone presenting the deposit book without proper authority, unless notice shall have been given to the bank that the book is lost, stolen or in improper hands."

"Section 7-- All depositors in this department must give their accounts, subject to the by-laws and regulations of the bank relating to savings deposits by writing their names in a book to be kept for that purpose, which shall contain a copy of such by-laws and regulations."

On June 4, 1905, it developed that on June 4,

1905, Plaintiff was living with her mother, but Plaintiff de-

posed that at that time she asked her mother to get \$100 for her

and asked that she at that time spoke to her mother about having

her sister Anna do so. She stated, however, that at that time the

book was "in my mother's hands. I had nothing to do with it."

My mother kept it-- I don't know where she kept it."

Plaintiff's sister Anna testified that on June 4, 1905,

she was living with other members of the family; that she then had

a heavy box, but came to her mother's every evening; that on

that evening she had a talk with the plaintiff; that Plaintiff told

her she wanted to get \$100 from the testament book and wanted the

money to go because her mother could not talk English. She says

that Plaintiff gave her the deposit book, taking it from under her

pillow, and said, "You can go with mother;" that Plaintiff also

told her that the money in the bank was under the name of "Marie

Veydt," and further that if they asked her ago to say she was born

in 1905. Anna says that the next morning she went to the bank and

took the money. She was asked to tell what she did at that time,

but no objection was sustained by the court. She says that she

took the bill the book and identified the withdrawal slip which she

signed and was released \$100. She says that she then went home

at 10 o'clock and handed the money to Plaintiff and went back to

her room; that Plaintiff then took the money and went to the bank

at 11 o'clock and withdrew the \$100.

the evening of June 23, 1925, plaintiff came to her shop; that she had the bank book with her and told the witness to go to the bank and get her some money, saying that the bank was not open in the morning, before she went to work; that she did not wish to keep \$100 in the office. This witness says that on that day she went to the bank with the pass book and made out a slip, and that they gave her \$100, and she then went home with it. The slip was produced, and in response to a question the witness says that she, meaning the bank clerk, asked her to sign her signature, but an objection by plaintiff to this evidence was sustained by the court. This witness further testified that in the evening she gave the money and the book to plaintiff, and that was the last she saw of them. She says that when the \$170 was drawn her mother was with her.

Anna Wojdas, the mother, testified that on the evening of June 24, 1925, the plaintiff told her sister Anna how to get the money at the bank; that the plaintiff had the deposit book and gave it to Anna, and that she, the mother, went with Anna the next day to the bank; that after Anna got the money she came home and gave the book and money to plaintiff, who was still in bed. With reference to the \$170 withdrawal the mother says that the first conversation about the money was two or three days before the fifth.

Defendant also offered the testimony of Stella Ziolkowski who worked in the savings department of the defendant bank at this time. With reference to the \$170 withdrawal the witness said that she made out the withdrawal, G. E'd it and sent it to the teller. She was asked who signed it and replied, "Marie Voyd," but an objection by plaintiff to this testimony was sustained. The witness said that she remembered the faces of Marie and Anna Wojdas; that at the time of the withdrawal she looked at the ledger and signature card and compared the signature on the ledger and withdrawal slip;

that the deposit book was presented. The deposit book and withdrawal slip were then received in evidence. The witness said she could not

The evening of June 22, 1935, plaintiff came to her shop; that she had the book with her and told the witness to go to the bank and get her some money, saying that the bank was not open in the morning before she went to work; that she did not wish to keep \$100 in the office. This witness says that on that day she went to the bank with the pass book and made out a slip, and that they gave her \$100, and she then went home with it. The slip was produced, and in response to a question the witness says that she, keeping the book with her, asked her to sign her signature, but an objection by plaintiff to this evidence was sustained by the court. This witness further testified that in the evening she gave the money and the book to plaintiff, and that was the last she saw of them. She says that when the \$100 was given her mother was with her.

Anna Vojtek, the mother, testified that on the evening of June 22, 1935, the plaintiff told her sister Anna how to get the money at the bank; that the plaintiff had the deposit book and gave it to Anna, and that she, the mother, went with Anna the next day to the bank; that after Anna got the money she came home and gave the book and money to plaintiff, who was still in bed. With reference to the \$100 withdrawn the mother says that the first conversation about the money was two or three days before the fifth.

Defendant also offered the testimony of Stella Johnson, who worked in the savings department of the defendant bank at this time. With reference to the \$100 withdrawn the witness said that she made out the withdrawal, \$100 and sent it to the teller. She was asked who signed it and replied, "Marie Vojtek," but an objection by plaintiff to this testimony was sustained. The witness said that she remembered the faces of Marie and Anna Vojtek; that at the time of the withdrawal she looked at the ledger and signature card and compared the signature on the ledger and withdrawal slip;

that the deposit book was produced. The witness said she could not

remember which one of the two ladies received the \$170.

Theresa Peters, another witness for the defendant, testified as to the withdrawal made on June 33, 1925. She said a lady presented a pass book to withdraw \$100; that she, the witness, had her make out and sign the withdrawal slip; that she signed it "Marie Voyd;" that the first name did not seem the same as on the ledger sheet, and that she, the witness, had her write it again. In reply to a question she said, "Yes; I had her answer the questions -- the identification we usually take," but on motion of defendant the answer was stricken out by the court. The withdrawal slip of this date was then received in evidence as defendant's exhibit 3, and the witness was asked what was done and whether she asked questions of the person making the withdrawal and whether the person making the withdrawal answered; but objections to all these questions were sustained by the court and the answers of the witness stricken out. Whereupon defendant offered to prove that this witness had asked the lady who presented the book, namely, Anna Vojdas, what was the date of her birth and that Anna answered September 8, 1903; that she asked her where Anna's mother was born and that Anna answered "Poland," but upon objection by the plaintiff the offer was excluded.

We think the evidence given and offered as to what occurred at the respective times when the money was withdrawn from plaintiff's account was admissible, and that it was reversible error to exclude it. It was admissible because under defendant's theory (which there was evidence tending to prove) the mother and sister were authorized to make the withdrawals. It was admissible also to show due care on the part of the defendant bank. If the bank used due care it is not liable. Felton v. Schiff, 136 Ill. App. 67; Gerardi v. New York Savings Bank, 53 N.Y. Misc. 123.

Plaintiff claims that since there were no propositions

remember which one of the two I had received the letter.
 Theresa Peters, another witness for the defendant,
 testified as to the withdrawal made on June 11, 1935. She said a
 lady presented a pass book to William Weiss; that she, the witness,
 had her name out and sign the withdrawal slip; that she signed it
 "Marie Voss"; that the first name did not appear on the
 ledger sheet, and that she, the witness, had her write it again.
 In reply to a question she said, "Yes; I had her answer the
 questions -- the identification we usually take," but on motion
 of the defense the answer was stricken out by the court. The wife
 drew up this date was then received in evidence as follows:
 and Exhibit 3, and the witness was asked what was done and
 whether she asked questions of the person making the withdrawal and
 whether the person making the withdrawal answered; but objections
 to all those questions were sustained by the court and the answers
 of the witness stricken out. Whereupon defendant offered to prove
 that this witness had asked the lady who presented the book, namely
 Anna Voss, what was the date of her birth and that Anna answered
 September 8, 1903; that she asked her where Anna's father was born
 and that Anna answered "Poland," but upon objection by the plain-
 tiff the offer was excluded.
 We think the evidence given and offered as to what
 occurred on the respective times when the money was withdrawn from
 Plaintiff's account was admissible, and that it was reversible
 error to exclude it. It was admissible because under defendant's
 theory (which there was evidence tending to prove) the method and
 manner were necessary to make the withdrawal. It was admissible
 also to show the care on the part of the defendant bank. It was
 shown that the date it is not liable. Exhibit 3, 1935. 1935.
 3. 3. Exhibit 3, 1935. 1935. 1935.

Plaintiff claims that since there were no proper
 ...

of law submitted, this court is precluded from passing on the merits. We held to the contrary in Parisian Novelty Co. v. Advertisers Mfg. Co., No. 32321, not yet reported.

For the error in excluding this evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSorely, JJ., concur.

of the committee, this point is excluded from passing on the

motion. It will be the duty of the committee to

investigate the matter and report thereon.

For the purpose of conducting the business of the

committee it is suggested that the committee

be authorized to employ such personnel as may be necessary.

Respectfully,
The Committee

NAPOLÉON CHEFFER,
Defendant in Error,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MASHURTY DELIVERED THE OPINION OF THE COURT.

Plaintiff while driving a truck on Princeton avenue in Chicago ran into a manhole near 25th place. The truck turned over and plaintiff was thrown therefrom, receiving injuries. He brought suit to recover compensation and upon trial had a verdict for \$2500, upon which judgment was rendered. Defendant by this writ of error seeks a reversal.

The declaration in various counts alleged the duty of defendant to maintain its highway in a proper state of repair and its neglect in permitting the manhole in question to remain in a state of decay, the cover being broken so that it was in an unsafe and dangerous condition, by reason whereof plaintiff, while driving a motor vehicle, ran over and into the manhole.

There is virtually no dispute on the facts. The jury could properly find that on April 10, 1922, at about a quarter to one o'clock p. m., the plaintiff was driving his truck north on Princeton avenue; that at the intersection of 25th place there are a number of manholes; that one of them had a broken iron lid or cover; that about one-fourth of the lid was missing and a piece of tin was laid loosely over the exposed portion; that this had been the condition for a number of weeks prior to the date of the accident; that when plaintiff's truck wheel struck the manhole, the cover turned up and the wheel went into the hole and the truck turned over, pinning the plaintiff to the pavement.

Altogether there were five manholes at this place, some

RETURN TO SUPERIOR COURT
OF COOK COUNTY.

WATSON CHURCH,
Plaintiff in Error,
vs.
CITY OF CHICAGO, a Municipal Corporation,
Defendant in Error.

THE JURY HEREBY DELIVERED THE OPINION OF THE COURT.

Plaintiff while driving a truck on Princeton Avenue
in Chicago ran into a manhole near 28th place. The truck turned
over and plaintiff was thrown therefrom, receiving injuries. He
brought suit to recover compensation and upon trial had a verdict
for \$2500, upon which judgment was rendered. Defendant by this
writ of error seeks a reversal.

The objection in various counts alleged the jury
of defendant to maintain its highway in a proper state of repair
and its neglect in permitting the manhole in question to remain in
a state of decay, the cover being broken so that it was in an un-
safe and dangerous condition, by reason whereof plaintiff, while
driving a motor vehicle, ran over and into the manhole.

There is virtually no dispute on the facts. The jury
could properly find that on April 10, 1922, at about a quarter to
one o'clock P. M., the plaintiff was driving his truck north on
Princeton Avenue; that at the intersection of 28th place there
was a number of manholes; that one of them had a broken iron lid or
cover; that about northwest of the lid was missing and a piece of
tin was laid loosely over the exposed portion; that this had been
the condition for a number of weeks prior to the date of the acci-
dent; that when plaintiff's truck wheel struck the manhole, the
cover turned up and the wheel went into the hole and the truck
turned over, plunging the plaintiff to the pavement.

Altogether there were five manholes at this place, none

of which were being used by the Electric light company, some by the Gas company and some by the City of Chicago.

It is first argued by defendant that the record fails to disclose that the particular manhole in question was controlled and maintained by it. There are two answers to this: (1) The plea of general issue, which was the only plea filed by the defendant, admitted the ownership and control of the instrumentality which caused the accident; and (2) proof that the accident happened because of a defect in a public street makes a prima facie case of ownership and control by the City.

The questions of defendant's negligence and of the alleged contributory negligence of the plaintiff were properly submitted to the jury for determination. We cannot say that its conclusion is manifestly against the weight of the evidence. There were no reversible errors upon the trial with reference to the instructions or the admissibility of evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

which were being used by the Electric Light Company, same by the

Gas Company and some by the City of Chicago.

It is first argued by defendant that the record fails

to disclose that the particular manhole in question was controlled

and maintained by it. There are two answers to this: (1) The

plea of general issue, which was the only plea filed by the de-

fendant, admitted the ownership and control of the instrumentality

which caused the accident; and (2) Grant that the accident happened

because of a defect in a public street makes a prima facie case of

ownership and control by the City.

The question of defendant's negligence was not at issue.

Alleged contributory negligence of the plaintiff were properly

submitted to the jury for determination. We cannot say that the

evidence is so manifestly against the weight of the evidence. There

were no reversible errors upon the trial with reference to the in-

struction or the admissibility of evidence.

The judgment is affirmed.

REVEREND J. J. O'CONNOR, J., DENYING.

REVEREND J. J. O'CONNOR, J., DENYING.

HENRY A. CHRISTY,
Appellee,

vs.

BELLA C. BROWN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MCGURLEY DELIVERED THE OPINION OF THE COURT.

Complainant filed his bill seeking an assignment by defendant of a certificate of stock of the Gulf Coast Irrigation Company and an accounting of dividends. A plea was filed asserting a settlement between the parties. Hearing was had upon the bill and plea, and it was held that defendant's plea was insufficient and relief was awarded to the complainant as prayed for in his bill. Defendant has appealed to this court.

The bill charges that complainant was the owner of the stock in question and at the time he purchased it it was taken in his name, and that thereafter, on May 1, 1918, it was transferred and issued in the name of Bella C. Brown, his daughter, the defendant; that she paid no consideration for the same and that the stock was placed in her name without her knowledge or consent, and in trust for the plaintiff, based on the confidential relationship and trust which the plaintiff had in his daughter; that it was at no time given or delivered to her as a gift; that he has had possession of the stock certificate and received all the dividends thereon; that on July 16, 1927, he requested her to transfer said stock to him, which she refused to do.

Complainant further alleges that he had previously filed a similar bill against defendant in the Superior court of Cook county to compel her to endorse certain other certificates of stock in other corporations; that at the time of filing that

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APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

WILLIAM G. BROWN,

THE JUSTICE HEREBY BELIEVES THE OPINION OF THE COURT.

Complainant filed his bill seeking an assignment by

defendant of a certificate of stock of the Gulf Coast Lumber

Company and an accounting of dividends. A plea was filed asserting

a settlement between the parties. Hearing was had upon the bill

and plea, and it was held that defendant's plea was insufficient and

relief was awarded to the complainant as prayed for in his bill.

Defendant has appealed to this court.

The bill charges that complainant was the owner of the

stock in question and at the time he purchased it it was taken in

his name, and that thereafter, on May 1, 1918, it was transferred

and issued in the name of William G. Brown, his daughter, the de-

fendant; that she paid no consideration for the same and that the

stock was placed in her name without any knowledge or consent, and

in trust for the plaintiff, based on the confidential relationship

and trust which the plaintiff had in his daughter; that it was at

no time given or delivered to her as a gift; that he has had

possession of the stock certificate and received all the dividends

thereon; that on July 10, 1927, he requested her to transfer said

stock to him, which she refused to do.

Complainant further alleges that he had previously

filed a similar bill against defendant in the Superior Court of

Cook County to compel her to execute certain other certificates

of stock in other corporations; that at the time of filing that

bill he had forgotten about the stock in the Gulf Coast Irrigation company and that by mutual release and agreement all of said other certificates of stock were transferred to him, but that "this stock aforesaid was not taken into consideration by either of them in making said settlement and transfer;" that the refusal of the defendant to make the transfer is causing him great damage and loss in that he will not receive the dividends thereon nor be entitled to vote nor negotiate or sell the stock; that defendant is conspiring with persons unknown to complainant to prevent the transfer of the certificate with the intent to cheat and defraud the complainant of his property rights unless the court shall direct her to endorse said certificate and to account to complainant for any dividends received on said stock.

The plea alleged the following agreement:

"MEMORANDUM OF AGREEMENT, made and entered into this 24th day of October, A. D. 1922, by and between Henry A. Christy of Chicago, Illinois, party of the first part, and Sanger Brown and Bella C. Brown, parties of the second part, WITNESSETH:

"THAT WHEREAS, there is now an action pending in the Superior court of Cook County wherein the said Henry A. Christy is complainant and the said Bella C. Brown is defendant, and

"WHEREAS, the said Henry A. Christy, in addition to claiming the property mentioned in said action, also claims certain furniture, silverware, chinaware, carpets, rugs, furniture and other house furnishings now in the possession of the said parties of the second part, or one of them, and

"WHEREAS, the parties hereto desire to settle all disagreements between them, IT IS THEREFORE HEREBY AGREED:

"1. That the said Bella C. Brown hereby transfers, sets over and assigns to Henry A. Christy all her right, title and interest in and to Certificate No. F. A. 555, D. A. 3329 of the preferred stock, 61 shares, of the Quaker Oats Company, together with a gold bag formerly belonging to the wife of Henry A. Christy and the mother of said Bella C. Brown, and the said Henry A. Christy hereby transfers, sets over and assigns to Bella C. Brown all his right, title and interest in and to Certificate No. F. 730 of the preferred stock of the Drake Hotel Company, and hereby transfers, sets over and assigns to Sanger Brown and Bella C. Brown all his right, title and interest of any nature, kind or description, in and to all jewelry, furniture, silverware, chinaware, carpets, rugs, furniture and other house furnishings now in the possession of the said parties of the second part.

"2. Henry A. Christy shall pay one-half of the master's fees

with the fact that the stock in the said bank was not
 company and that by mutual release and agreement all of said stock
 certificate of stock were presented to him, but that "this stock
 otherwise was not taken into consideration by either of them in
 making said settlement and transfer;" that the release of the two
 tenants to make the transfer is causing him great damage and loss
 in that he will not receive the dividends thereon nor be entitled
 to vote nor negotiate or sell the stock; that defendant is conspi-
 cing with persons unknown to complainant to prevent the transfer of
 the certificate with the intent to cheat and defraud the complainant
 of his property rights unless the court shall direct her to endorse
 said certificate and to account to complainant for any dividends
 received on said stock.

The plea alleges the following agreement:
 MEMORANDUM OF AGREEMENT, made and entered into this 24th day of
 October, A. D. 1932, by and between Henry A. Christy of Chicago,
 Illinois, party of the first part, and Margaret Brown and Belle C.
 Brown, parties of the second part, WITNESSETH:
 THAT WHEREAS, there is now an action pending in the Superior
 Court of Cook County wherein the said Henry A. Christy is com-
 plainant and the said Belle C. Brown is defendant, and
 WHEREAS, the said Henry A. Christy, in addition to claiming the
 property mentioned in said action, also claims certain furniture,
 silverware, china, etc., and other household and other items
 mentioned in the possession of the said parties of the
 second part, on and at which
 WHEREAS, the parties hereto desire to settle all differences
 between them, IT IS HEREBY AGREED:
 1. That the said Belle C. Brown hereby transfers, sets over and
 assigns to Henry A. Christy all her right, title and interest in
 and to Certificate No. 2, A. 222, D. A. 222 of the first part
 of the Illinois State Bank, together with a
 gold and silver jewelry belonging to the wife of Henry A. Christy and
 the money of said Belle C. Brown, now the said Henry A. Christy
 hereby transfers, sets over and assigns to Belle C. Brown all his
 right, title and interest in and to Certificate No. 1, V. 730 of the
 first part of the Illinois State Bank, and hereby transfers,
 sets over and assigns to Margaret Brown and Belle C. Brown all his
 right, title and interest in any nature, kind or description, in
 and to all jewelry, furniture, china, etc., and other household and
 other items mentioned in the possession
 of the said parties of the second part.

2. Henry A. Christy shall pay one-half of the master's fees

and Bella C. Brown the other half. The said suit in the Superior court shall then be dismissed without costs to either party.

"3. The party of the first part and the parties of the second part hereby acknowledge full satisfaction of any and all claims of any nature, kind or description either party has against the other from the beginning of the world to this date.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year in this agreement first above written.

HENRY A. CHRISTY (SEAL)
 BELLA C. BROWN (SEAL)
 SAMUEL BROWN (SEAL)"

The decision turns upon the construction of paragraph numbered "3" of this agreement, wherein the parties undertake to settle "any and all claims of any nature, kind or description either party has against the other from the beginning of the world to this date."

The first part of the preamble of this agreement recites the suit then pending in the Superior court, the second part relates to the claims of Henry Christy to certain household property, and the third part reads: "Whereas the parties hereto desire to settle all disagreements between them." Next comes paragraph numbered "1" which gives the terms of the agreement of settlement with reference to the pending suit and the household furniture; next paragraph, numbered "2", relates to the costs of the suit; and it is reasonable to say that paragraph numbered "3" relates to and is pursuant to the previous sentence in the preamble reciting the desire of the parties "to settle all disagreements between them."

The language of this agreement is sufficiently broad and comprehensive to include every kind of claim and demand. Where the language is unambiguous and clear, parties must be held to their agreement as thus expressed. Complainant does not assert that this agreement was procured by fraud; he only asserts that at the time of filing his original bill in the Superior court in 1922 he had forgotten about the stock in question. There is no averment that at the time of the execution of this agreement he had forgotten about

and John G. Brown the other half. The said bill in the suggestion
court shall then be returned without notice to either party.

The party of the first part and the parties of the second
part hereby agree that all questions of any and all claims
of any nature, right or interest either party has against the
other from the beginning of the world to this date.

IN WITNESS WHEREOF, the parties have hereunto set their hands
and seals the day and year in this agreement first above written.

HENRY A. HENRY (SEAL)
WILLIAM C. HENRY (SEAL)
WILLIAM C. HENRY (SEAL)

The decision turns upon the construction of paragraph
of this agreement, wherein the parties undertake to
release "any and all claims of any nature, kind or description either
party has against the other from the beginning of the world to this
date."

The first part of the preamble of this agreement reads
"that the said parties, desiring to settle and adjust all
claims of the nature of Henry's claims to certain household goods
and effects, and the said parties have agreed to release all
claims of the nature of Henry's claims to certain household goods
and effects."

It is further agreed that the parties shall release all
claims of the nature of Henry's claims to certain household goods
and effects, and the said parties have agreed to release all
claims of the nature of Henry's claims to certain household goods
and effects.

It is further agreed that the parties shall release all
claims of the nature of Henry's claims to certain household goods
and effects, and the said parties have agreed to release all
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claims of the nature of Henry's claims to certain household goods
and effects, and the said parties have agreed to release all
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and effects.

It is further agreed that the parties shall release all
claims of the nature of Henry's claims to certain household goods
and effects, and the said parties have agreed to release all
claims of the nature of Henry's claims to certain household goods
and effects.

it; he only says that in the execution of this agreement this stock was not taken into consideration; this is merely to assert that the agreement does not mean what it says.

Among the cases holding that a similar agreement is sufficient to release all claims are Moss v. Moss, 93 Ill. 449; Johnson v. Wright, 231 Ill. App. 5; Commons v. Snow, 194 Ill. App. 569; Houston v. Trower, 297 Fed. 336; Pierson v. Hooker, 3 Johns. (N. Y.) 68; Clark v. Roberts, 62 N. E. 253. In Duff v. Hutchinson, 57 Hun. (N.Y.) 152, there was a suit to have a release reformed and limited in its operation and effect to three specific matters. It was held that an instrument cannot be restricted because a party subsequently finds that he ought to have been more careful in giving it, and that the plaintiff, having executed a release with full knowledge that it was a general release in settlement of all differences, cannot avoid its effect by claiming that subsequently he discovered other matters of which he was not aware when he executed it.

Complainant argues that this is a case for the application of the rule of construction which holds that where in a contract a specific enumeration of objects or things is followed by a general expression, such expression will be held to include only such things or objects as are of the same kind as those particularly enumerated, citing Bassett v. Lawrence, 193 Ill. 494; Crum v. Sawyer, 132 Ill. 443, and like cases. This rule does not aid complainant. The agreement manifests the intention of the parties to settle, in addition to the particular matters mentioned, "all disagreements between them." However, the rule that general expressions include things or objects that are of the same kind as those particularly enumerated fits the stock in question, which was precisely of the same kind, with reference to the thing itself, the name of the holder and the relief sought, as the things particularly enumerated in the agreement.

The language of the agreement is not to be sworn of its

The language of the agreement is not to be taken literally. It is to be construed in accordance with the intention of the parties. In this case, the intention of the parties was to release all claims and to settle all disputes. The agreement is to be construed in accordance with the intention of the parties.

efficiency by any narrow, technical and close construction. The parties evidently intended to settle all matters which might be in controversy between them with particular reference to any certificates of stock which might be in the name of the defendant but which complainant claimed to own. The agreement undertook to dispose finally of all such matters, and we are of the opinion that it must be held conclusive of the claim of the complainant.

The judgment of the chancellor is therefore reversed and the cause remanded with instructions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Matchett, F. J., and O'Connor, J., concur.

CHARLES HORN, Doing Business
as CHARLES HORN LUMBER COMPANY,
Appellee,

vs.

E. A. HOOVER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSHEEHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sold defendant several carloads of lumber at prices agreed upon; defendant made remittances by checks, deducting two per cent as a discount. Plaintiff brought suit to recover the amount of these deficiencies and upon trial by the court had judgment for \$95.58, from which defendant appeals.

Defendant asserts that the check by which he sent his remittances was so worded as to operate as an accord and satisfaction when endorsed and accepted by plaintiff, the payee. The evidence fails to disclose that there was any bona fide dispute between the parties as to the amount due. Charles Horn, the plaintiff, testified that there was no agreement as to the allowance of any discount; that defendant some weeks after the delivery of the cars asked for such allowance, but plaintiff declined to allow this, to which defendant replied that he knew that he was not entitled to the same in accordance with the terms of the sale and that he would send a check for the cars. Subsequently the check was issued and received. This is called a voucher check, on the back of which appears a statement of the amount due and the words, "For Settlement, balance due on cars," then follows the numbers of the cars. On another portion of the voucher check are these printed words:

"This Voucher-Check is issued in Payment of the Within Account, and by Enforessment Below the Payee accepts it as such. No Other Receipt Necessary."

Plaintiff upon receiving such check enforced it and deposited it to his account. It is claimed that by accepting and endorsing this, there was an accord and satisfaction of the debt.

It is the well established rule that before the acceptance of a portion of a debt can be held as payment of the whole amount due, there must be a bona fide dispute between the parties as to the correct amount due and that where there is no such dispute the receipt of less than the whole amount due is no satisfaction of the same. In re Estate of Cunningham, 511 Ill. 311; Farmers & Merch. Life Assn. v. Gaine, 224 Ill. 399; Snow v. Griesheimer, 220 Ill. 106; Jackson v. Security Mutual Life Ins. Co., 233 Ill. 161; Shumayer v. Wisconsin Dairy Farms Co., 199 Ill. App. 868. In Janel v. Barry, 267 Ill. 359, cited by Defendant, it was held that one of the essential conditions to accord and satisfaction is the existence of "a dispute in good faith as to amount due."

There was no such dispute between the present parties, - merely a request by the buyer for the allowance of a discount, to which he conceded he was not entitled, and a refusal of the seller to allow the same.

The judgment was right and is affirmed.

AFFIRMED.

Ketchett, P. J., and O'Connor, J., concur.

LOUIS A. FANKETA,
Appellee,

vs.

MUTUAL LIFE INSURANCE COMPANY
OF BALTIMORE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it of \$100 entered upon the finding by the court.

Plaintiff alleged that he was employed by the defendant as an agent and deposited with it \$100 to secure the faithful performance of his services; that he subsequently left this employment and having faithfully performed his services was entitled to the return of the \$100 deposited by him. Defendant asserts that the \$100 was deposited not only for security for the faithful performance of plaintiff's services but also to indemnify the defendant for all losses by lapses of policies secured by plaintiff, for which, under the terms of the contract of employment, plaintiff agreed to be responsible.

There is no dispute as to the facts. October 27, 1926, plaintiff deposited \$100 with defendant pursuant to the terms of a cash bond of even date executed by plaintiff. This bond, among other things, referred to the appointment of plaintiff as one of defendant's collecting and soliciting agents to procure applications of all kinds of policies issued by the defendant. The condition of the obligation was the faithful performance of services by plaintiff and to "indemnify the company for all losses by lapse of policy or otherwise ** whether said lapses occur during his employment or subsequent thereto." It was also agreed that "in case of suit upon this bond for losses by lapse of policy," the written statement of the superintendent

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APPEAL FROM MUNICIPAL COURT

MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK
Appellant

THE JUSTICE HEREBY AFFIRMS THE DECISION OF THE COURT.

Defendant appeals from a judgment against it of \$100

entered upon the finding by the court.

Plaintiff alleges that it was employed by the de-

fendant as an agent and deposited with it \$100 as security for

its faithful performance of his services; that he subsequently left

this employment and having actually performed his services was

entitled to the return of the \$100 deposited by him. Defendant

admits that the \$100 was deposited not only for security for the

faithful performance of plaintiff's services but also as indemnity

for the return of all losses by reason of policies secured by

plaintiff, for which, under the terms of the contract of employ-

ment, plaintiff agreed to be responsible.

It is found that on or about the 10th day of October, 1922,

plaintiff deposited \$100 with defendant pursuant to the

terms of a contract of employment entered into by plaintiff. This

contract, among other things, provided for the deposit of this

\$100 as one of defendant's collateral and existing assets for

the security of all kinds of policies issued by the de-

fendant. The condition of the obligation was that plaintiff was

to return to defendant by plaintiff and to "indemnify the company

for all losses by reason of policy or policies - whether said

losses occur during his employment or subsequent thereto." It

was also agreed that "in case of loss upon this bond for losses

by reason of policy," the written statement of the supervising

verified from the company's books should be conclusive evidence of said lapses, the parties to the bond waiving the right to demand any other evidence thereof.

The rules and regulations touching plaintiff's employment are set forth rather extensively in a document called Agent's Agreement executed by both parties, from which it appears that defendant wrote both Industrial insurance and what is called Ordinary life insurance business. Plaintiff was authorized to secure both kinds of insurance. However, there is no evidence that he secured any Ordinary insurance business. The first sixteen paragraphs of the Agreement relate mostly to the details of Industrial insurance and the commissions of plaintiff on such insurance secured by him. Commissions were to be paid in advance. Paragraph 16 (a) relates to commissions due and not paid to the agent after his retirement from the company's employ. Paragraph 16 (b) relates to premiums on lapsed policies and provides that commissions on such lapses will be charged to his account. The case turns upon the construction of paragraph 16 (c), which is as follows:

"Should charge for the lapse resulting during the period following the severance of connection with the Company exceed the commission due, the Agent and his bond will be liable for such excess less any amount due or to become due said Agent on Ordinary business which shall be applied toward liquidation of such indebtedness."

Paragraphs 17, 18 and 19 relate to commissions and premiums on Ordinary/business as distinguished from Industrial business.

Examination of the terms of the Bond and of the Agent's Agreement leaves no doubt of the meaning of the crucial Paragraph 16 (c). It provides that, should the charges against the Agent's commission account for Industrial insurance policies lapsing during the period following the severance of his employment, exceed the commission due him, the amount of his bond will

verified from the company's books should be conclusive evidence of this. However, the parties to the agreement shall be bound by any other evidence thereof.

The rules and regulations governing Plaintiff's employment are set forth rather extensively in a document called Agent's Agreement executed by both parties, from which it appears that defendant wrote both Industrial Insurance and what is called Ordinary Life Insurance business. Plaintiff was authorized to secure both kinds of insurance. However, there is no evidence that he secured any Ordinary Insurance business. The first sixteen paragraphs of the Agreement relate mostly to the details of Industrial Insurance and the commission of Plaintiff on such insurance secured by him. Commissions were to be paid in advance. Paragraph 16 (a) relates to commissions due and not paid to the agent after his retirement from the company's employ. Paragraph 16 (b) relates to premiums on lapsed policies not provided that commissions on such lapses will be charged to his account. The last three of the provisions of Paragraph 16 (c), which is an

entirely

"Should change for the Japan territory during the period following the execution of commission with the Company. Except the commission fee, the Agent and his bond will be liable for such expenses any amount due or to become the said Agent on ordinary business which shall be applied toward liquidation of such indebtedness."

Paragraphs 17, 18 and 19 relate to commissions and expenses of Plaintiff's business as follows:

Paragraph 17 relates to the Agent's expenses of the Agent's business. Paragraph 18 relates to the Agent's expenses of the Agent's business. Paragraph 19 relates to the Agent's expenses of the Agent's business. Paragraph 20 relates to the Agent's expenses of the Agent's business. Paragraph 21 relates to the Agent's expenses of the Agent's business. Paragraph 22 relates to the Agent's expenses of the Agent's business. Paragraph 23 relates to the Agent's expenses of the Agent's business. Paragraph 24 relates to the Agent's expenses of the Agent's business. Paragraph 25 relates to the Agent's expenses of the Agent's business. Paragraph 26 relates to the Agent's expenses of the Agent's business. Paragraph 27 relates to the Agent's expenses of the Agent's business. Paragraph 28 relates to the Agent's expenses of the Agent's business. Paragraph 29 relates to the Agent's expenses of the Agent's business. Paragraph 30 relates to the Agent's expenses of the Agent's business. Paragraph 31 relates to the Agent's expenses of the Agent's business. Paragraph 32 relates to the Agent's expenses of the Agent's business. Paragraph 33 relates to the Agent's expenses of the Agent's business. Paragraph 34 relates to the Agent's expenses of the Agent's business. Paragraph 35 relates to the Agent's expenses of the Agent's business. Paragraph 36 relates to the Agent's expenses of the Agent's business. Paragraph 37 relates to the Agent's expenses of the Agent's business. Paragraph 38 relates to the Agent's expenses of the Agent's business. Paragraph 39 relates to the Agent's expenses of the Agent's business. Paragraph 40 relates to the Agent's expenses of the Agent's business. Paragraph 41 relates to the Agent's expenses of the Agent's business. Paragraph 42 relates to the Agent's expenses of the Agent's business. Paragraph 43 relates to the Agent's expenses of the Agent's business. Paragraph 44 relates to the Agent's expenses of the Agent's business. Paragraph 45 relates to the Agent's expenses of the Agent's business. Paragraph 46 relates to the Agent's expenses of the Agent's business. Paragraph 47 relates to the Agent's expenses of the Agent's business. Paragraph 48 relates to the Agent's expenses of the Agent's business. Paragraph 49 relates to the Agent's expenses of the Agent's business. Paragraph 50 relates to the Agent's expenses of the Agent's business. Paragraph 51 relates to the Agent's expenses of the Agent's business. Paragraph 52 relates to the Agent's expenses of the Agent's business. Paragraph 53 relates to the Agent's expenses of the Agent's business. Paragraph 54 relates to the Agent's expenses of the Agent's business. Paragraph 55 relates to the Agent's expenses of the Agent's business. Paragraph 56 relates to the Agent's expenses of the Agent's business. Paragraph 57 relates to the Agent's expenses of the Agent's business. Paragraph 58 relates to the Agent's expenses of the Agent's business. Paragraph 59 relates to the Agent's expenses of the Agent's business. Paragraph 60 relates to the Agent's expenses of the Agent's business. Paragraph 61 relates to the Agent's expenses of the Agent's business. Paragraph 62 relates to the Agent's expenses of the Agent's business. Paragraph 63 relates to the Agent's expenses of the Agent's business. Paragraph 64 relates to the Agent's expenses of the Agent's business. Paragraph 65 relates to the Agent's expenses of the Agent's business. Paragraph 66 relates to the Agent's expenses of the Agent's business. Paragraph 67 relates to the Agent's expenses of the Agent's business. Paragraph 68 relates to the Agent's expenses of the Agent's business. Paragraph 69 relates to the Agent's expenses of the Agent's business. Paragraph 70 relates to the Agent's expenses of the Agent's business. Paragraph 71 relates to the Agent's expenses of the Agent's business. Paragraph 72 relates to the Agent's expenses of the Agent's business. Paragraph 73 relates to the Agent's expenses of the Agent's business. Paragraph 74 relates to the Agent's expenses of the Agent's business. Paragraph 75 relates to the Agent's expenses of the Agent's business. Paragraph 76 relates to the Agent's expenses of the Agent's business. Paragraph 77 relates to the Agent's expenses of the Agent's business. Paragraph 78 relates to the Agent's expenses of the Agent's business. Paragraph 79 relates to the Agent's expenses of the Agent's business. Paragraph 80 relates to the Agent's expenses of the Agent's business. Paragraph 81 relates to the Agent's expenses of the Agent's business. Paragraph 82 relates to the Agent's expenses of the Agent's business. Paragraph 83 relates to the Agent's expenses of the Agent's business. Paragraph 84 relates to the Agent's expenses of the Agent's business. Paragraph 85 relates to the Agent's expenses of the Agent's business. Paragraph 86 relates to the Agent's expenses of the Agent's business. Paragraph 87 relates to the Agent's expenses of the Agent's business. Paragraph 88 relates to the Agent's expenses of the Agent's business. Paragraph 89 relates to the Agent's expenses of the Agent's business. Paragraph 90 relates to the Agent's expenses of the Agent's business. Paragraph 91 relates to the Agent's expenses of the Agent's business. Paragraph 92 relates to the Agent's expenses of the Agent's business. Paragraph 93 relates to the Agent's expenses of the Agent's business. Paragraph 94 relates to the Agent's expenses of the Agent's business. Paragraph 95 relates to the Agent's expenses of the Agent's business. Paragraph 96 relates to the Agent's expenses of the Agent's business. Paragraph 97 relates to the Agent's expenses of the Agent's business. Paragraph 98 relates to the Agent's expenses of the Agent's business. Paragraph 99 relates to the Agent's expenses of the Agent's business. Paragraph 100 relates to the Agent's expenses of the Agent's business.

be liable for such excess, but if the insurance company should owe plaintiff commissions on Ordinary business procured by him, such amount due shall be applied towards liquidation of the indebtedness due to the company arising from the lapsed Industrial insurance policies.

From the nature of Industrial insurance many lapsed policies would be expected and in view of the fact that the agent received his commissions on such insurance in advance, we would expect some provision whereby there should be charged to the Agent's account the pro rated commissions on such lapsed policies. Manifestly, the \$100 deposited was to take care of such charges.

It was stipulated between the parties that at the time plaintiff left defendant's employ he had faithfully performed his services and there was nothing due him on Ordinary life insurance or Industrial insurance written by him, but that plaintiff was indebted to the defendant company in an amount over and above the amount of his deposit for commissions advanced him on Industrial insurance policies, which policies had later lapsed. As plaintiff was indebted to the defendant on these lapsed policies in an amount exceeding \$100, and as under the terms of the Bond and the Agent's Agreement, the cash deposit was to cover just such a situation, defendant was entitled to retain the \$100 to apply on account of the amount owing to it from plaintiff.

The trial court was in error in its construction of the Bond and Agreement. The judgment is therefore reversed and judgment of nul capiast is entered in this court.

JUDGMENT REVERSED AND JUDGMENT OF
NUL CAPIAST.

Matchett, P. J., and O'Connor, J., concur.

the liability for such excess, but in the insurance company which was
plaintiff's commission on ordinary business provided by him, and
amount due should be repaid to the plaintiff of the insurance
due to the company arising from the excess business insurance
policy.

From the nature of industrial insurance many losses
policy would be expected and in view of the fact that the agent
received his commission on such insurance in advance, he would
expect some provision whereby there should be charged to the agent's
account the two noted commissions on such losses policy. And
further, the \$100 deposited was to take care of such charges.

It was stipulated between the parties that at the time
plaintiff left defendant's employ he had lawfully performed his
services and there was nothing due him on any life insurance
or industrial insurance written by him, but that plaintiff was in-
debted to the defendant in an amount over and above the
amount of his deposit for commissions advanced him on industrial
insurance policy, which policy he had later issued. As plaintiff
was indebted to the defendant on these losses policy in an amount
exceeding \$100, and on under the terms of the bond and the agent's
agreement, the same deposit was to cover that such a situation,
defendant was entitled to retain the \$100 as equity on account of
the amount owing to it from plaintiff.

The trial court was in error in its construction of
the bond and agreement. The judgment is therefore reversed and
judgment of all costs is entered in this court.

JUDGMENT REVERSED AND JUDGMENT OF
COSTS AWARDED.

RECORDED IN BOOK 10, PAGE 100, AND 101, COUNTY OF...

PAUL KRAUSE and LOUISE KRAUSE,
Appellees,

vs.

GEORGE GROVE and ANNIE GROVE,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against the defendants to recover \$271.40 claimed to be due them as the balance of the purchase price for a piece of real estate which they sold defendants. The case was tried before the court without a jury and there was a finding and judgment in plaintiffs' favor for \$221.45.

The record discloses that on April 28, 1921, plaintiffs sold to the defendants a certain house and lot for \$430, of which \$500 was paid in cash and the balance, under the terms of the written contract, was payable \$30 a month. The evidence further shows that each of the parties had a book in which the payments were written down as made; that all of the monthly payments were met by the defendants and that about April, 1925, there was due and unpaid \$2210 principal and \$11.40, the contract entered into between the parties for the sale of the house and lot calling for six per cent interest on the balance due. The evidence further shows that about April, 1925, plaintiff Louise Krause met defendant Annie Grove and stated that plaintiffs owed a mortgage upon which they were required to pay seven per cent, that they were receiving only six per cent from defendants and asking if defendants would not pay the balance due so that plaintiffs might reduce or pay the mortgage which plaintiffs owed, and there is testimony to the effect that defendants would pay plaintiffs the balance due on the contract if some reduction were made. It was finally agreed that defendants would borrow \$2000, securing the payment of it by a

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APPEAL FROM DISTRICT COURT

OF OKLAHOMA

STATE OF OKLAHOMA and JAMES K. HARRIS,
Appellants,

VERSUS
JAMES K. HARRIS and JAMES K. HARRIS,
Appellees.

IN A BILL OF DIVORCE AND IN A BILL OF REFORMATION OF THE COURT.

Plaintiff's prayer is that the defendant be

divorced from her and that the balance of the

property be divided between them and that they each

have the care and custody of the child without a jury

trial. The case was tried before the court without a jury

and the court rendered judgment in plaintiff's favor for \$500.

The record shows that on April 25, 1932, plaintiff

deposited in the defendant a certain house and lot for \$500.

of which \$200 was paid in cash and the balance was

paid in installments, was payable \$50 a month. The evidence

shows that each of the parties had a book in which the

payments were written down as made; that all of the monthly

payments were made by the defendant and that about April, 1933, the

contract was for \$11.40, the contract was

ended and the parties for the sale of the house and lot

ending for six per cent interest on the balance due. The evi-

dence shows that about April, 1933, plaintiff's house

was sold and the proceeds were paid to plaintiff's house

upon which they were required to pay seven per cent, that they were

required to pay seven per cent interest on the balance due

and that plaintiff's house was sold and the proceeds were

paid to plaintiff's house and that there is testimony to

the effect that plaintiff would pay to plaintiff the balance due on

the contract if some reduction were made. It was finally agreed

that defendant would borrow \$2000, securing the payment of it by a

mortgage on the property in question, and that any expense in procuring the loan must be borne by plaintiffs. The evidence shows that thereupon defendants entered into negotiations with Peter W. Kranz, engaged in the real estate business, and secured a loan of \$2000, executing a mortgage on the property in question to secure payment of the same; that Kranz charged \$50 for making the loan and about May 1st plaintiffs, defendants and Kranz met to close the matter. Kranz produced a check for \$1950, being the proceeds of the \$2,000 loaned, and delivered it to the defendants who in turn endorsed and delivered it to plaintiffs; that thereupon the real estate contract was surrendered to Kranz and he marked it cancelled; also the books of account in which were recorded the payments made by defendants under the contract were surrendered. Sometime afterwards plaintiffs demanded the balance they claimed was still due under the terms of the contract, and payment being refused they brought this suit.

Plaintiffs gave testimony to the effect that the matter had not been settled in full but defendants had paid only \$1950 about May 1, 1925.

We have carefully considered all the evidence in the record and are clearly of the opinion that the version testified to by defendants is the true statement of the facts, and that there is no explanation of the facts as testified to by the plaintiffs that any reasonable person would believe. No reason was suggested upon the trial nor in the briefs filed by plaintiffs why the defendants would encumber the property for \$2,000 to make a payment which was not then due. We think the overwhelming weight of the evidence is that plaintiffs were desirous of obtaining money to pay a mortgage bearing 7 per cent interest, and since they were receiving only 6 per cent interest on the balance due from defendants, were willing to make some reduction in the amount due thereon

...the fact that the defendant had not been satisfied in full but defendant had paid only \$1,000 about May 1, 1925.

Q. Now, you have carefully examined all the evidence in the record and are clearly of the opinion that the record reflects the true statement of the facts, and that there is no explanation of the facts as recited by the plaintiff that any reasonable person would believe. No reason was suggested upon the trial nor in the briefs filed by plaintiff why the defendant would not have the property for \$2,000 to make a payment which was not then due. We think the overwhelming weight of the evidence is that plaintiff was desirous of obtaining money to pay a mortgage bearing 7 per cent interest, and since they were not able to get that interest on the balance due from defendant, they were willing to take some consideration in the amount due.

A. Yes, I am. I am of the opinion that the record reflects the true statement of the facts, and that there is no explanation of the facts as recited by the plaintiff that any reasonable person would believe. No reason was suggested upon the trial nor in the briefs filed by plaintiff why the defendant would not have the property for \$2,000 to make a payment which was not then due. We think the overwhelming weight of the evidence is that plaintiff was desirous of obtaining money to pay a mortgage bearing 7 per cent interest, and since they were not able to get that interest on the balance due from defendant, they were willing to take some consideration in the amount due.

Q. Now, you have carefully examined all the evidence in the record and are clearly of the opinion that the record reflects the true statement of the facts, and that there is no explanation of the facts as recited by the plaintiff that any reasonable person would believe. No reason was suggested upon the trial nor in the briefs filed by plaintiff why the defendant would not have the property for \$2,000 to make a payment which was not then due. We think the overwhelming weight of the evidence is that plaintiff was desirous of obtaining money to pay a mortgage bearing 7 per cent interest, and since they were not able to get that interest on the balance due from defendant, they were willing to take some consideration in the amount due.

A. Yes, I am. I am of the opinion that the record reflects the true statement of the facts, and that there is no explanation of the facts as recited by the plaintiff that any reasonable person would believe. No reason was suggested upon the trial nor in the briefs filed by plaintiff why the defendant would not have the property for \$2,000 to make a payment which was not then due. We think the overwhelming weight of the evidence is that plaintiff was desirous of obtaining money to pay a mortgage bearing 7 per cent interest, and since they were not able to get that interest on the balance due from defendant, they were willing to take some consideration in the amount due.

if paid before due, and that defendants agreed to this. This is shown by the fact that the contract for the purchase and sale of the lot was cancelled and surrendered at the time of the payment of the \$1250.

The judgment of the Municipal court of Chicago is contrary to the evidence and it is reversed.

JUDGMENT REVERSED.

Matchett, P. J., and McBurney, J., concur.

$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = F(x)$

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WILLIE HANKE,
Defendant in Error,

vs.

ALVINIA H. LLOYD et al.,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Willie Hanke filed her bill for an accounting against Alvinia H. Lloyd and the Lake View Trust and Savings Bank, claiming that she had given Alvinia H. Lloyd, who will be hereinafter referred to as the defendant, more than \$4,000 for safe keeping and that defendant had failed to return \$3,000. The defendant filed an answer admitting the receipt of the money but averring that she had returned it all. The case was referred to a master in chancery, who took the evidence and made up his report. He found in favor of the complainant; his finding was approved by the chancellor and a decree entered that the defendant pay to the complainant \$3093, together with certain costs, and it is to reverse this decree that the defendant appeals.

The master found - and his finding was sustained by the chancellor - that the complainant in 1922 received from her brother's estate certain moneys; that while the estate was being probated in the Probate court of Cook county defendant, whom complainant had known for some time and in whom she reposed much confidence, influenced complainant to turn over the money to defendant the defendant representing that she was well able to take care of the money which complainant was to receive from her brother's estate; that complainant was a woman of limited business capacity and unfamiliar with business transactions, and complied with defendant's request by turning over to her the money she had received from her brother's estate; that thereafter the defendant from time to time repaid to complainant small amounts aggregating about

WILLIAM HENRY WILSON
1111 1/2 N. 1st St.
St. Paul, Minn.
1947

William Henry Wilson filed her bill for an accounting against
Alvin K. Wilson and the Late First and Savings Bank, claim-
ing that she had given Alvin K. Wilson, who will be represented
relatives to an the defendant, more than \$4,000 for safe keeping
and that defendant had failed to return \$2,000. The defendant
filed an answer admitting the receipt of the money but averring
that she had returned it all. The case was referred to a master
in summary, who took the evidence and made up his report. He
found in favor of the complainant; his finding was sustained by
the chancellor and a decree entered that the defendant pay to the
complainant \$2,000, together with certain costs, and it is so re-
versed and set aside that the defendant appeal.
The master found - and his finding was sustained by
the chancellor - that the complainant in 1938 received from her
brother a certain sum of money; that with the estate was being
probated in the Probate Court of Cook County defendant, whom com-
plainant had known for some time and in whom she reposed much con-
fidence, introduced complainant to turn over the money to defendant
the defendant representing that she was well able to take care of
the money which complainant was to receive from her brother's
estate; that complainant was a woman of limited business capacity
and unfamiliar with the best transactions, and conspired with de-
fendant's request by turning over to her the money she had received
from her brother's estate; that it resulted the defendant from time
to time would be compelled to make payments representing about

\$1,000, but refused to return any more, claiming that she had repaid complainant in full and had obtained her receipt for \$4205. The master and the chancellor both found that this receipt had been altered after it had been given by complainant to defendant; that the receipt, as actually given, was for \$1205, and that it had been altered by raising it to \$4205. The master further found that the testimony of the defendant to the effect that the receipt had not been altered was untrue and unworthy of belief; and upon an accounting found there was still due from defendant to complainant the sum of \$3095 and recommended a decree in favor of the complainant for that amount. Objections to the report were over-ruled; they were afterwards ordered to stand as exceptions and were later over-ruled by the chancellor and a decree entered in accordance with the master's report. The findings of the decree are substantially the same as those of the master. We have carefully considered all the evidence in the record and are of the opinion that the finding of the master and the chancellor is warranted by the evidence.

The defendant contends that the decree should be reversed because a court of chancery has no jurisdiction; that the case was properly one for the law side of the court.

The record discloses that the defendant filed an answer to the bill and after issue was joined the cause was referred to the master; that no objection was made that a court of chancery was without jurisdiction until the complainant had rested her case, when counsel for the defendant moved the court to dismiss the bill for want of equity because, he contended, the case was properly an action at law. To this motion the master replied that he would consider it, but for the defendant to put in her defense; this defendant proceeded to do and, so far as the record discloses, never afterwards requested the master to pass upon her motion. Moreover,

12,000, but refused to return any more, claiming that she had no
held employment in 1911 and had obtained her passport for 1912.

that the passport, as actually given, was for 1911, and that it
was not altered by retaining it to 1912. The master further found

that the testimony of the defendant as to the effect that the pas-
sage had not been altered was untrue and unworthy of belief, and

upon an examination found there was still no trace of defendant's
the defendant's testimony for that amount. Defendant's testimony was
everywhere; they were otherwise ordered to stand on their own feet
and were later ordered by the defendant and a nurse on board in
connection with the master's report. The fact is of the nature

and substantially the same as those of the master. The facts are
concerned all the evidence in the record and one of the questions
the fact of the nature and the character of the evidence by the
evidence.

The defendant found that the master should be
taken before a court of inquiry and as instructed; that the
case was properly one for the law side of the court.

The record shows that the defendant filed an answer
to the bill and when issue was joined the case was referred to
the court and no objection was made that a court of inquiry

was without jurisdiction until the complaint had been set aside,
when counsel for the defendant moved the court to dismiss the bill
for want of equity. However, the court was properly in

action to, but for the defendant to be in two actions, this being
and dismissed to be made, so far as the record shows that
the master is not now the master, however.

the objections filed to the master's report did not raise the question of the jurisdiction of the court. Nor was this question suggested when the matter came before the chancellor. In the late case of Curtis v. LeMayne, 248 Ill. App. 99, where a similar question was urged, we said that if the defendant desired to take advantage of the want of jurisdiction of a court of chancery, it should have so set up in the answer. We there said (p. 103): "The subject matter of the suit was not wholly foreign to a court of equity, and the rule that equity will not take jurisdiction where a complete and adequate remedy exists at law is intended for the protection of the court and not for the purpose of shielding defendants from their just obligations. Hart v. Oliver, 296 Ill. 209."

We think the court of equity had jurisdiction, but in any event the defendant has not saved the question, - her objection being too late.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSweeney, J., concur.

Journal Title

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
vs.
ACHILLIS BALALAS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment of the Municipal court of Chicago whereby he was found guilty of the offense charged in the information, sentenced to ninety days imprisonment in the House of Correction and to pay a fine of \$200. The trial was before the court, a jury having been waived. The court after hearing the evidence found the defendant guilty as charged and imposed sentence as stated.

We have before us only the common law record and the point made by the defendant is that the information is insufficient to support the judgment. The information was verified by the affidavit of C. Pross and it avers: "that Achillis Balalas heretofore, to-wit, on the 24th day of February, A. D. 1926, in the City of Chicago, aforesaid, did then and there wilfully and unlawfully, and by means of a fraudulent check and with the intent to cheat and defraud, obtain from this affiant a waiver of lien for \$200.00 on property owned by the said Achillis Balalas. The said Achillis Balalas tendered this affiant a check for \$200.00 drawn on the Fidelity Savings Bank of Chicago, made payable to Paul Demos and signed A. Balalas, when at the time the said Achillis Balalas did not have sufficient funds in said bank in viol. of Par. 164 Ch. 38 R. S. of 1921 contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

Paragraph 164 which defendant is charged to have

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CHICAGO TO BUREAU OF INVESTIGATION
ON CHICAGO

THE PEOPLE OF THE STATE OF ILLINOIS
Attorney General
CHICAGO, ILLINOIS

TO THE HONORABLE JUDGE OF THE CIRCUIT COURT OF THE COUNTY OF COOK, ILLINOIS

By this report the defendant seeks to establish the fact that the defendant is the same person as the person who was found guilty of the offense charged in the information, sentenced to the House of Correction and to pay a fine of \$500. The trial was before the court, a jury having been sworn. The court after hearing the evidence found the defendant guilty as charged and imposed sentence as stated.

I have before me only the common law record and the point made by the defendant is that the information is invalid in respect to the fact. The information was verified by the affidavit of C. Tracy and it avers: "That Adolphus Beland, formerly, known as the 25th day of February, A. D. 1926, in the City of Chicago, Illinois, did then and there unlawfully and unlawfully, and by means of a fraudulent check and with the intent to cheat and defraud, obtain from this office a value of \$200.00 on property owned by the said Adolphus Beland. The said Adolphus Beland - the said office - check for \$200.00 drawn on the Chicago Savings Bank of Chicago, made payable to Cash, James and signed A. Beland, when at the time the said Adolphus Beland did not have sufficient funds in said bank in violation of the Statute of 1921 contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

violated provides: "That any person who with intent to defraud shall make or draw or utter or deliver any check **** for the payment of any money on any bank *** and thereby obtains from any person any money, personal property or other valuable thing, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank ** for the payment of such check **** in full upon its presentation, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined not more than one thousand dollars or imprisoned not more than one year, or both. The making, drawing or uttering of such check *** as aforesaid shall be prima facie evidence of intent to defraud."

Counsel for the defendant in their printed argument filed, after quoting a part of paragraph 164 above quoted, say: "For the failure of the information to charge that the defendant obtained any money, or personal property, and knowing at the time of making such check he had not sufficient funds or credit at the bank, the defendant committed no crime." And in their reply brief they say: "The statute aims to punish persons who know that at the time of such making (check) have not sufficient funds in or credit with such bank. The defendant in this case is not charged with knowing at the time of making such check he did not have sufficient funds in or credit with such bank; in the absence of such allegation he is not charged with the commission of a crime denounced by statute." This is the entire argument made on behalf of the defendant.

The information in substance charges that the defendant by means of a fraudulent check and with the intent to defraud and cheat C. Props, the complaining witness, obtained from Props a waiver of a lien on property owned by the defendant, the lien on the property being for \$200. It further charges that at the time the defendant delivered the check he did not have sufficient funds

...that any person who with intent to defraud
shall make or issue or deliver any check or other
instrument of any money on any bank or other financial institution
knowing at the time of such making, drawing, issuing or delivery
that the maker or drawer has not sufficient funds in or credit with
such bank for the payment of such check or other instrument; and upon
conviction thereof shall be fined not more than one thousand dollars
or imprisoned not more than one year, or both. The making,
drawing or issuing of such check or other instrument shall be prima
facie evidence of intent to defraud.

General for the defendant in their printed argument
filed, after making a part of paragraph 104 above quoted, say:
"For the failure of the defendant to charge that the defendant
obtained any money, or personal property, and knowing at the time
of making such check he had not sufficient funds or credit at the
bank, the defendant admitted to crime. And in their reply brief
they say: 'The statute aims to punish persons who know that at
the time of such making (check) have not sufficient funds in or
credit with such bank. The defendant in this case is not charged
with knowing at the time of making such check he did not have
sufficient funds in or credit with such bank; in the absence of
such allegation he is not charged with the commission of a crime
intended by statute.' This is the entire argument made on behalf
of the defendant.

The information is substance charges that the defendant
and by means of a fraudulent check and with the intent to defraud
and from G. Brown, the complaining witness, obtained from Brown a
value of a lien on property owned by the defendant, the lien on
the property being for \$500. It further charges that at the time

in the bank to meet it and that what the defendant did was in violation of the statute quoted. We think the information sufficiently charges that at the time the defendant delivered the check in question he knew that he did not have sufficient funds in the bank to meet the check, because it charges that the defendant uttered the fraudulent check with the intent to cheat and defraud Props. The statute defines the offense and specifies the punishment. It then adds that the making, uttering, drawing or delivering of such check shall be prima facie evidence of the intent of the defendant to defraud. In other words, on the trial where the information is based on the violation of Par. 164, it is not necessary for the People to prove the state of mind of the defendant to make out a prima facie case - that he knew that he did not have sufficient funds to meet the check - but that it is sufficient to prove the uttering of the check by the defendant and the fact that the bank has refused to pay it on account of insufficient funds. This proof under the statute makes a prima facie case for the People. It is then incumbent upon the defendant to prove, if he can, that he did not know at the time he uttered the check that he did not have sufficient funds in the bank to meet it. No motion was made to quash the information, and we think that after the case has been heard the information is sufficient to sustain the judgment. People v. Weber, 132 Ill. App. 102.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Witchett, P. J., Dissents.

McSurely, J., concurs.

in the bank to meet it and that the defendant did not in violation of the statute quoted. We think the information sufficiently charges that at the time the defendant delivered the check in question he knew that he did not have sufficient funds in the bank to meet the check, because it charges that the defendant knew the situation which existed with the intent to cheat and defraud the bank. The statute defines the offense and requires the punishment. It then adds that the making, drawing or delivering of such check shall be prima facie evidence of the intent of the defendant to defraud. In other words, on the trial when the information is heard on the violation of Par. 1st, it is not necessary for the People to prove the state of mind of the defendant to make out a prima facie case - that he knew that he did not have sufficient funds to meet the check - but that it is sufficient to prove the making of the check by the defendant and the fact that the bank has failed to pay it on account of insufficient funds. This proof under the statute is prima facie evidence for the People. It is then the defendant's duty to prove, if he can, that he did not know at the time he issued the check that he did not have sufficient funds in the bank to meet it. No mention was made to discuss the information, and we think that after the case has been heard the information is not likely to sustain the indictment. People v. ...

The People of the County of Cook, State of Illinois, vs. ...

CHARGE

THE PEOPLE OF THE COUNTY OF COOK, STATE OF ILLINOIS, vs. ...

2491A/552

LOUISE EUGENE,
Appellee,

vs.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

CENTRAL BUSINESS MEN'S
ASSOCIATION, a Corporation,
Appellant.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse an order of the Circuit court of Cook county entered December 10, 1927, vacating an order of dismissal entered December 7, 1926, and reinstating the cause.

The record discloses that on December 27, 1926, an order was entered by the Circuit court of Cook county dismissing plaintiff's suit for want of prosecution; that on September 26, 1927, plaintiff filed its motion under section 89 of the Practice act to vacate the order of dismissal, the motion being supported by affidavit. The defendant appeared and demurred to the motion, the demurrer was over-ruled, the order of dismissal set aside and the cause reinstated.

By section 89 of the Practice act the common law writ of error coram nobis was abolished and all errors of fact committed in the proceedings of any court of record, which therefore might be corrected by the common law writ, may, upon reasonable notice, be corrected upon motion in writing made at any time within five years after the rendition of the final judgment in the case. The motion under the statute is the plaintiff's declaration in the new suit to reverse or recall the judgment. Harris v. Chicago House Trucking Co., 314 Ill. 500.

Defendant's demurrer having been over-ruled, the question for determination is the sufficiency of plaintiff's motion under the facts as disclosed by the affidavit in support

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[illegible]

of it. The affidavit sets up that the cause had been pending in the Circuit court of Cook county for more than two years preceding the date of the filing of the motion; that it appeared as case No. 74 on the printed calendar of Judge Scanlan, one of the judges of that court; that said calendar was issued in the month of September, 1926; that on October 27, 1926, upon notice given to counsel, an order was entered by Judge Rymer, the then Chief Justice of the Circuit court of Cook county, removing the cause from Judge Scanlan's calendar, re-assigning it and placing it upon the calendar of Judge Fisher, another judge of the Circuit court of Cook county; that thereafter on December 7, 1926, Judge Hill, a judge from one of the southern counties of Illinois, was regularly sitting in the Circuit court of Cook county and hearing cases from Judge Scanlan's calendar; that the cause still appeared on Judge Scanlan's printed calendar and that a part of such calendar was assigned to Judge Hill; that on such part appeared the case in question; that the case came on trial call of Judge Hill, sitting in the Circuit court of Cook county, on December 17, 1926; that when the cause was called, no one appearing, it was dismissed for want of prosecution; that Judge Hill did not know that the cause had been assigned to Judge Fisher and was then pending on his calendar, and that by reason of this error of fact the order of dismissal was entered.

It is obvious that the cause erroneously remained on Judge Scanlan's calendar after the order had been entered assigning it to Judge Fisher's calendar. And it is also obvious that Judge Hill was not apprized of this fact. The clerk should have stricken the cause from Judge Scanlan's calendar when the order re-assigning the case to Judge Fisher was entered. The failure to do so was an error of the clerk and it has been repeatedly

held that such failure of the clerk may be corrected under section 89 of the Practice act. Brady v. Washington Insurance Co., 32 Ill. App. 380; Silverman v. Childs, 107 Ill. App. 532; Mulbrook v. Lawton, 207 Ill. App. 497; Butterick Publishing Co. v. Coleridge, 242 Ill. App. 228.

The order of the Circuit court of Cook county appealed from is affirmed.

APPROVED.

Witchett, P. J., and McDurely, J., concur.

CLEMENT A. BOYLE,
Appellee,

vs.

YELLOW CAB COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by reason of his automobile being damaged in a collision with a cab of the defendant. There was a trial before the court without a jury and at the close of the plaintiff's case the defendant moved for a finding in its favor. The motion was over-ruled, defendant elected to stand by its motion, the court found in favor of the plaintiff in the sum of \$125, judgment was entered on the finding and the defendant appeals.

It appears from the evidence that about 1:30 o'clock on the morning of December 31, 1925, plaintiff was driving north in the east roadway of Independence boulevard, a one-way thoroughfare in the city of Chicago. He was traveling at about 35 miles an hour. The roadway was icy and wet. Roosevelt road crosses Independence boulevard and there are signal lights at the intersection. At the time in question the signals permitted plaintiff to continue north on Independence boulevard. Independence boulevard consisted of two roadways at the place in question, the north bound traffic in the east and the southbound in the west roadway of the boulevard. There is a parkway between the two roadways. When plaintiff was near the north crosswalk of Roosevelt road he observed a Yellow cab standing at the east curb, headed north, about 150 feet north of Roosevelt road. When he was about 115 to 120 feet from the cab its driver, without warning, started toward

4481.A.657

STATE OF NEW YORK

IN SENATE

January 1, 1935

MR. JUSTICE C. HENNER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover damages claimed to have been sustained by reason of his automobile being damaged in a collision with a car of the defendant. There was a trial before the court without a jury and at the close of the plaintiff's case the defendant moved for a finding in its favor. The motion was overruled, defendant elected to stand by its motion, the court found in favor of the plaintiff in the sum of \$100, judgment was entered on the finding and the interest thereon.

It appears from the evidence that about 1:30 o'clock on the morning of December 31, 1933, plaintiff was driving north in his car on the highway at a one-way street where upon there is a one-way street. The car was traveling at about 25 miles an hour. The roadway was icy and wet. Defendant's car was traveling south on the highway at the same time in question the witness testified plaintiff is continuing north on Independence boulevard. Independence boulevard consisted of two roadways at the place in question, the north roadway traffic in the east and the south roadway in the west. There is a gateway between the two roadways. The plaintiff's car was in the north roadway and was stopped at a yellow and standing at the east curb, headed north, about 150 feet north of Houserville road. When he was about 150 feet from the intersection of the two roadways, the plaintiff's car was struck by the defendant's car.

his left or west to make a turn. Upon seeing this plaintiff sounded his horn about five times, turned his automobile toward the west intending to pass in front of the cab, but upon observing that the driver of the cab was continuing toward the west, plaintiff turned his car toward the east in an endeavor to pass behind the cab. He applied his brakes but was unable to prevent the cars colliding. His automobile was damaged and it was to recover the cost expended in making necessary repairs that the suit was brought.

Plaintiff testified in his own behalf, and also called another witness who was driving an automobile north in the boulevard about 150 feet behind plaintiff at the time in question. They both testified substantially to the facts as above stated and further that there was no other traffic in the street at the time.

The defendant contends that the plaintiff was guilty of contributory negligence as a matter of law, because the evidence shows that the place in question was a closely built up residence community, and plaintiff was driving at about twenty-five miles an hour in violation of section 22 of the Motor Vehicle act, and therefore defendant's motion for a finding in its favor should have been sustained. The statute provides that if a person drives an automobile through the residential portion of an incorporated city in excess of fifteen miles, this fact shall be prima facie evidence that he is operating his automobile at a greater rate of speed than is reasonable and proper, having regard to the traffic and the use of the way, so as to endanger the life or limb or injure the property of any person.

It has been held that this statute does not fix any arbitrary speed limit in any locality, but leaves to the court or jury the question of what is a reasonable and proper rate of speed, having regard to the conditions of traffic. People v. Lloyd, 178 Ill. App. 66. And although the evidence in the instant case was

his left or went to make a turn. Upon seeing this plaintiff wanted
his car about five times, started his automobile toward the west in-
tending to pass in front of the cab, but upon observing that the
driver of the cab was continuing toward the west, plaintiff turned
his car toward the east in an endeavor to pass behind the cab. He
applied his brakes but was unable to prevent the cars colliding.
His automobile was damaged and it was so severe the head expended
in making necessary repairs that the suit was brought.

Plaintiff testified in his own behalf, and also called
another witness who was giving an automobile number in the police
verb about 190 feet behind plaintiff at the time in question. They
both testified substantially to the facts as above stated and further
that there was no other traffic in the street at the time.

The defendant contends that the plaintiff was guilty
of contributory negligence as a matter of law, because the evidence
shows that the place in question was a closely built up residential
community, and plaintiff was driving at about twenty-five miles an
hour in violation of section 22 of the Motor Vehicle act, and there-
fore defendant's motion for a finding in its favor should have been
sustained. The statute provides that if a person drives an automo-
bile through the residential portion of an incorporated city in
violation of fifteen miles, this fact shall be prima facie evidence that
the driver is negligent, and that the jury shall find in favor of the
defendant.

It has been held that this statute does not fix any
arbitrary speed limit in any locality, but leaves to the court or
jury the question of what is a reasonable and proper rate of speed,
having regard to the conditions of traffic. People v. ...
Ill. App. 66. And although the evidence in the instant case was

prima facie evidence that plaintiff was operating his automobile at a greater rate of speed than was proper, yet this would not bar a recovery unless plaintiff's act in driving twenty-five miles an hour was the proximate cause of the injury. Lorette v. Director General, 306 Ill. 345.

In the instant case we are clearly of the opinion that whether the rate of speed plaintiff was driving his car at the time proximately contributed to the collision, and whether he was guilty of contributory negligence, were questions of fact and not of law, and the court did not err in refusing to sustain the defendant's motion. As a general proposition the question of contributory negligence of the plaintiff and the question of the proximate cause of an accident are usually questions of fact and become questions of law only when all reasonable minds would reach the conclusion that plaintiff was guilty of negligence which proximately contributed to the accident. If the facts are such that men of ordinary judgment may arrive at different conclusions on these questions, then the case is a proper one to be submitted to court or jury as a question of fact. Heiting v. C. R. I. & P. Ry. Co., 252 Ill. 466. In the instant case we think the questions were questions of fact. And we are unable to say that the finding of the trial Judge in favor of the plaintiff is against the manifest weight of the evidence. On the contrary, we think the evidence warranted the finding.

The judgment of the Municipal court of Chicago is therefore affirmed.

AFFIRMED.

Ketchett, F. J., and McGuire, J., concur.

...the fact that the plaintiff was driving his automobile
at a greater rate of speed than was proper, yet this would not
be a bar to his recovery if it is not in a contributory
manner an hour was the proximate cause of the injury. Ill. 400.
Ill. 400.
In the instant case we are directly of the opinion that
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negligence of the plaintiff and the question of the proximate cause
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of law only when all reasonable minds would reach the conclusion
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tributed to the accident. If the facts are such that men of
ordinary judgment may arrive at different conclusions on these
points, then the case is a proper one to be submitted to a jury
as a question of fact. Hall v. Hall, 121 Ill. 2d, 10.
Ill. 400. In the instant case we think the questions were
questions of fact. And we are unable to say that the finding of the
trial judge in favor of the plaintiff is against the weight of
evidence of the evidence. On the contrary, we think the evidence
warranted the finding.
The judgment of the Municipal Court of Chicago is
therefore affirmed.

JOSEPH E. SNOWDEN, Administrator
of the Estate of Ella Lee, Deceased,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On September 3, 1927, Jennie Robinson and Missie Phillips brought an action against the Metropolitan Life Insurance Company to recover \$300 claimed to be due them under two policies issued by the Metropolitan Life Insurance Company on the life of Ella Lee, mother of the plaintiffs. In their statement of claim they alleged that they had complied with all the provisions of the insurance policies and were entitled to receive \$300 as provided in the policies, and further, that they had expended more than \$300 for funeral expenses and by the terms of the policies were entitled to be reimbursed by the Insurance company.

The defendant filed an affidavit of merits which in effect admitted the execution of the two policies sued on, but denied that plaintiffs were the beneficiaries in any policies issued by the defendant. The affidavit of merits then set up certain provisions of the policies and averred that since plaintiffs had not sued as executors or administrators of the estate of Ella Lee, deceased, they had no right to maintain the suit. The affidavit of merits further set up certain provisions of the policies to the effect that they should not take effect unless the assured was in good health at the time of their issuance, or if the assured had consulted a physician within two years before the date of the policies or had had certain diseases. It was

averred that the assured was not in sound health on the date of the issuance of the policies, that she had been attended by a physician for a certain illness within two years prior to the date of the policies, and that she had certain other serious diseases. A number of other matters are set up in the affidavit of merits, to which, in the view we take of the case, it will be unnecessary to here refer.

The case went to trial on November 4, 1927, and an order was entered on that date giving leave to plaintiffs to file an amended statement of claim. The case was then heard before the court without a jury, and at the conclusion of the evidence the court postponed the matter until November 19th. On November 16th an amended statement of claim was filed, in which Joseph E. Snowden, administrator of the estate of Ella Lee, is named as plaintiff and the Metropolitan Life Insurance Company as defendant. Plaintiff was given leave to file the amended statement of claim so as to conform with the proofs already made. The amended statement of claim alleges that Ella Lee was insured by the defendant company, two policies for \$150 each being issued, bearing date July 21, 1924; and it was averred that plaintiff had "complied with all the terms of said contract (the policies) and is therefore entitled to receive the sum of \$300.00 as per contract," and the amount of plaintiff's claim was there laid in the sum of \$346.67, being the \$300, the face of the two policies, with interest thereon. The court at the conclusion of plaintiff's case found the issues in favor of plaintiff and against defendant and judgment was entered for the \$346.67.

The defendant on cross-examination of plaintiff's witnesses put in evidence the proofs of death of the assured Ella Lee, also the physician's statement purporting to show the cause of her death, each of these documents being sworn to before a notary public. The defendant also offered in evidence applications made by Ella Lee,

...that the accident was not in round health on the date of the issuance of the policies, and that she had been attended by a physician for a certain illness within two years prior to the date of the policies, and that she had certain other serious illnesses. A number of other matters are set up in the affidavit of ... to which, in the view we take of the case, it will be unnecessary to refer.

The case went to trial on November 4, 1937, and an order was entered on that date giving leave to plaintiff to file an amended statement of claim. The case was then heard before the court without a jury, and at the conclusion of the evidence the court postponed the matter until November 1938. On November 1938, an amended statement of claim was filed, in which James B. ... administrator of the estate of Miss Lee, is named as plaintiff and the National Life Insurance Company as defendant. Plaintiff was given leave to file her amended statement of claim on or before ... the court's order. The amended statement of claim alleges that Miss Lee was insured by the defendant company, two policies for \$100 each being issued, bearing date July 21, 1934; and it was averred that plaintiff had complied with all the terms of said contract (the policies) and is therefore entitled to receive the sum of \$200.00 as per contract, and the amount of plaintiff's claim was there laid in the sum of \$200.00, being the \$200, the face of the two policies, with interest thereon. The court at the conclusion of plaintiff's case found the issues in favor of plaintiff and against defendant and judgment was entered for the \$200.00.

The defendant on cross-examination of plaintiff's witness and in evidence the proof of death of the insured Miss Lee, and the physician's statement purporting to show the cause of her death, each of these documents being sworn to before a notary public. The defendant also offered in evidence regulations made by Miss Lee,

the deceased, for the insurance in question.

The policies of insurance are not in the record, and while some of the provisions of the policies are admitted in defendant's affidavit of merits, yet we think the record is insufficient to support the judgment.

Plaintiff in his statement of claim alleged the issuance of the two policies by defendant, and, further, that plaintiff had complied with all of the provisions of the policies. It was therefore incumbent upon him to prove these facts. We are unable to say whether the provisions of the policies were complied with, because they are not in the record. Nor is there sufficient admissions in the defendant's affidavit of merits or sufficient evidence in the record to enlighten us on this subject. Whether the applications for the insurance signed by Ella Lee were made a part of the policies, we are unable to determine; but if that be the fact, then the applications and the proofs of death tend strongly to show that the assured was not in good health when the policies were issued, but that on the contrary she was in bad health. The evidence shows that she died eight days after the issuance of the policies.

In view of the fact that we have not the provisions of the policies in the record, the judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Ketchett, P. J., and McSurely, J., concur.

[illegible]

...the ...
...the ...
...the ...

MEYER W. GOLDSTEIN,
Appellee,

vs.

HARRY NIZELL et al.,
Defendants.

On Appeal of JULIUS SIMON,
ANNA SIMON, SAM CITTREN and
REBECCA CITTREN From Interlocutory
Order Appointing Receiver.
Appellants.

INTERLOCUTORY APPEAL FROM
CIRCUIT COURT OF COOK
COUNTY.

MR. JUSTICE McCREERY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order appointing a receiver in a foreclosure proceeding.

The receiver was appointed without requiring the complainant making the application to give the statutory bond. Paragraph 55, chap. 22, Cahill's Illinois Statutes. The statute provides that a bond need not be given when, for good cause shown, the court is of the opinion that the receiver ought to be appointed without such bond. The point presented for reversal is that the order appointing the receiver fails to show that, in the opinion of the court, no bond need be required nor any facts upon which such opinion is based; citing Sherman Park State Bank v. Loan Office Building Corp., 238 Ill. App. 450, and similar cases. Undoubtedly it is the rule that the order appointing a receiver must show these facts and ordinarily such omission will compel a reversal.

The trust deed sought to be foreclosed conveyed not only the premises but also the rents of the premises, and gave the trustee the right to retain possession of the premises after the breach of any of the covenants. The bill alleges a default in the payment of notes amounting to some \$13,500 and also that the property is subject to a first mortgage of \$55,000, and that there has been a

WITNESSES:
 [Illegible]

BY:

Direct examination

Examination

THE COURT OF THE
 CITY OF
 IN THE
 COUNTY OF
 STATE OF

ALL THINGS COMING TO THE COURT OF THE CITY OF

THIS IS TO CERTIFY THAT ALL THINGS COMING TO THE COURT OF THE CITY OF

RELATING TO THE RECEIPT OF A CERTAIN SUMMATION

THE RECEIPT WAS RECORDED WITHOUT DELAYING THE

COMMISSIONER MAKING THE SAME ACTION TO GIVE THE STATUTORY NOTICE

RECEIVED BY THE COURT OF THE CITY OF THE CITY OF THE CITY OF

PROVIDE THAT A CERTAIN SUMMATION WAS RECORDED WITHOUT DELAYING THE

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default in the payment of the principal and interest on the first mortgage; also that there has been a failure to pay the taxes and assessments on the property; also a failure to keep the premises insured, as required by the trust deed. The bill also alleges that the maker of the notes is insolvent; that the premises are not sufficient security for the amounts involved, and that a mechanic's lien has been recorded against the premises. In the trust deed the grantor, in the event of a default, agreed that upon the filing of a bill to foreclose, a receiver should, upon motion of the complainant, without notice, be appointed immediately to take possession and charge of the premises and collect the income. The trust deed provides that "a bond upon application of the receiver is hereby expressly waived."

January 28, 1928, notice was served on the defendants that the appointment of a receiver would be requested, and on January 30th the Security Bank of Chicago was appointed receiver. Subsequently, counsel appearing for defendants here entered their appearance in the cause. February 25th notice was served on all the parties that on February 27th the receiver would present its petition for leave to make certain expenditures and for an order upon certain defendants to deliver all leases of the premises to the receiver, and an order was entered pursuant to said petition. The court furthermore, upon a petition by the receiver, ordered that coal be bought for the premises, that janitor's bills be paid and water taxes; also upon petition of the receiver, certain tenants were ruled to show cause why they should not be punished for contempt of court in failing to obey the order of the court to pay rent to the receiver.

All of said proceedings were upon notice to defendants and without any objection on their part to the form of the order appointing the receiver.

The form of the order appointing the receiver is, as we have said, defective, but it is not void. Walenti v. Krolik, 234

that in the payment of the principal and interest on the first mortgage; also that there has been a failure to pay the taxes and assessments on the property; also a failure to keep the premises insured, as required by the mortgage deed. The bill also alleges that the maker of the notes is insolvent; that the premises are not well taken care of; that the premises are in a state of disrepair; and that a receiver is needed to take possession and manage the premises and collect the income. The trust deed provides that a bond upon appointment of the receiver is hereby expressly waived. January 22, 1922, notice was served on the defendant that the appointment of a receiver would be requested, and on January 23, 1922, the Security Bank of Chicago was appointed receiver. Thereafter, counsel representing the defendant have entered their appearance in the cause. February 22nd notice was served on all the parties that on February 27th the receiver would present his petition for leave to make certain amendments and for an order upon certain defendants to deliver all items of the premises to the receiver, and an order was entered pursuant to said petition. The court furthermore, upon a petition by the receiver, ordered that any be bought for the premises, that Janitor's bills be paid and water taken; also upon petition of the receiver, certain tenants were ruled to show cause why they should not be permitted for contracts of court in failing to obey the order of the court to pay rent to the receiver. All of said proceedings were upon notice to defendants and without any objection on their part to the form of the order appointing the receiver. The form of the order appointing the receiver is, as we have said, defective, but it is not void. Wainwright v. Kneale, 228

111. App. 407. The court had jurisdiction to appoint a receiver and the facts appearing in the bill fully justified doing so without requiring a bond from the complainant. The order would have been complete if it had included a finding that under the terms of the trust deed the giving of a bond was waived and that the court was of the opinion that this, in connection with the other facts appearing in the bill of complaint, was sufficient to relieve the complainant of giving a bond. We see no good reason why under the circumstances the chancellor might not at any time amend its order so as to cure the defect without impairing its validity.

We are of the opinion that, by failing to object to the form of the order appointing the receiver and by failing to object to the subsequent proceedings before the chancellor initiated by the receiver, the defendants are estopped to demand that the order of appointment be reversed. Statutory provisions may be waived and the conduct of the defendants must be held to have waived the irregularity in the form of the order.

We are also moved by the consideration that to hold this order void would result in much greater confusion and injustice than to permit it to stand.

The order is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

2431A. 657

364 - 32306

CHARLES R. WELLS, Administrator,)

Appellee,)

v.)

LOUIS HENSON,)

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 2, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On the afternoon of June 7, 1926, Beatrice A. Wells, a young woman thirteen years and four months old, who lived at home with her parents, and was in the first year of High School, boarded a northbound Crawford avenue street car, in Chicago, intending to go to the terminus of the line at Bryn Mawr avenue, on her way home. Bryn Mawr avenue is an east and west street, and is intersected at right angles by Crawford avenue. Crawford avenue is a paved street, and has upon it north and southbound street car tracks. The street cars on Crawford avenue change from one track to another at Bryn Mawr avenue by means of a switch track. When the street car in which Beatrice A. Wells was riding reached Bryn Mawr avenue, the end of the line, there were two other street cars, both headed north, ahead of it on the northbound car track. The car in which she was riding having stopped, the passengers, four in number, walked toward the front end of the car to make their exit by the front right-hand door. The street car conductor,

RETURN FROM
VIRGINIA COURT
DOCK COUNTY

CHARLES E. WELLS, administrator,
appealed,
vs.
JAMES E. WELLS,
appellant.

Opinion filed May 2, 1938.

MR. JUSTICE TAYLOR delivered the

opinion of the court.

On the petition of JAMES E. WELLS, appellant,

vs.
JAMES E. WELLS, administrator,
appealed,
the court is of the opinion that the
test of this case, namely, whether a
person who is injured, traveling in an
of the line at 27th Street, or not was born, when
that avenue is an east and west street, and is intersected
at right angles by Howard Avenue, Howard Avenue is a
north and south street, and was upon it north and southward street
at 27th Street. The street runs on Howard Avenue change
from one block to another at 27th Street Avenue by means of a
switch track. When the street car in which Beatrice A.
Wells was riding reached 27th Street Avenue, the end of the
line, there were two other street cars, both headed north,
head of it on the northward car track. The car in which
she was riding having stopped, the passengers, four in
number, walked toward the front end of the car to make their
exit by the front right-hand door. The street car conductor,

who had stood at the rear of the street car, meanwhile, had closed the rear door and walked through the street car, up to the front vestibule, where the motorman was. The exit door at the front of the car was controlled by a hand lever, operated by the motorman. After stopping the street car, the motorman opened the door, and Beatrice A. Wells got off, being the first passenger to do so. The motorman stated that before she got off he did not hear any horn or siren, or sound or warning. He further stated that when she stepped off the car she took one step and was about to take the second step when he noticed a truck about one foot away from her, just even with the door. The truck, which was a 2½ ton Nelson Lemoon truck, driven by the defendant, Louis Benson, and traveling between the street car and the curb and going in the same direction in which the street car had been going, struck her and knocked her down with the front and rear left wheels, passing over her body, killing her instantly. The distance between the street car and the right-hand curb at Crawford avenue, was eleven feet, and the truck itself was about seven feet wide. There is evidence that the truck after striking and running over the deceased and traveling a distance of forty feet, did not stop until the two right wheels, both front and rear, had gone up over the curb.

Section 3625 of the Chicago Municipal Code of 1902, p. 1056, is as follows:

"Vehicles to stop when street cars discharge or take on passengers. It shall be unlawful for any person driving or having charge, possession or control of any vehicle being driven or propelled or operated upon the streets of the city,

the bag about the rear of the station car, immediately and closed the rear door and walked through the street car, up to the front vestibule, where the restaurant was. The exit door at the front of the car was controlled by a hand lever, operated by the restaurant. After alighting the street car, the restaurant opened the door, and Detective A. Wells got off, being the first passenger to do so. The restaurant stated that before she got off he did not hear any horn or alarm or sound or warning. He further stated that when she stepped off the car she took one step and was about to take the second step when he noticed a truck about one foot away from her, just over with the door. The truck, which was a 1934 Ford Model A sedan, driven by the defendant, Louis Larson, and traveling between the street car and the curb and going in the same direction as which the street car had just moved, struck her and knocked her down with the front end and rear left wheels, passing over her body. William Rex instantly. The distance between the street car and the right-hand end of Grand Avenue, an eleven feet, and the truck itself was about seven feet wide. There is no doubt that the truck was striking and turning over the deceased and, traveling a distance of forty feet, did not stop until the rear right wheels, both front and rear, had gone up over the curb.

[illegible]

upon overtaking any street car which is stopped for the purpose of discharging or taking on a passenger or passengers, to permit or cause said vehicle to pass or approach within ten feet of said car as long as the said car is so stopped or remains standing for the purpose of discharging or taking on a passenger or passengers."

On June 30, 1938, Charles R. Wells, her father, as administrator of her estate, brought suit in the Circuit Court of Cook County, against the defendant, Louis Hanson, for damages caused by her death. There was a trial before the court, with a jury, and a verdict and judgment in favor of the plaintiff and against the defendant, in the sum of \$5,000.00. The matter comes before us on an appeal by the defendant from that judgment.

It is contended for the defendant that the deceased was guilty of contributory negligence. It is argued in the brief for the defendant that if she had looked to the south she would have seen the truck approaching; that if she did not look, she must be charged with such knowledge as she would have obtained had she looked in that direction. That argument is entirely unsound. Exercise of ordinary care on her part in the situation in which she was when she got off the car, does not mean that she should have been on her guard against the truck being driven, in violation of the law, past a street car standing still and from which passengers were, rightfully, alighting. The Chicago Union Traction Co. v. Leach, 215 Ill. 184. Further, the deceased being a minor, was required to use only that degree of care required of children of her age, intelligence, capacity, discretion and experience. McGuire v. Guthmann

...for the purpose of discharging or acting as a
...of passengers, to permit of being used
...vehicle to pass or proceed within the foot of
...said car as long as the said car is so stopped
...or remains standing for the purpose of discharg-
...ing or taking on a passenger or passengers."

On June 30, 1933, Charles H. White, her father,
an administrator of her estate, brought suit in the Circuit
Court of Cook County, against the defendant, Louis Bessie,
for damages caused by her death. There was a trial before
the court, with a jury, and a verdict and judgment in favor
of the plaintiff and against the defendant, in the sum of
\$5,000.00. The matter came before me on an appeal by the
defendant from that judgment.

It is contended for the defendant that the de-
fendant was guilty of contributory negligence. It is
argued in the brief for the defendant that it was not
in the least probable that she would have been in the truck approaching
that it she did not pass, she would be charged with contributory
negligence as she would have obtained her ticket in that
direction. That argument is entirely unavailing. It is
of ordinary care on her part in the situation in which she
was when she got off the car, does not mean that she should
have been on her guard against the truck being driven, in
violation of the law, past a street car standing still and
from which passengers were, rightfully, alighting. The
defendant, Louis Bessie, was required to use only the
degree of care required of children of her age, intelligence,
experience, education and experience.

Transfer Co., 234 Ill. 125.

The evidence shows, substantially, that after getting off the street car she took about one step and then saw that the truck was upon her. In that situation of danger, what she did then and what she did thereafter, inasmuch as she was in imminent danger of immediate death, cannot, in any view of it, be looked upon as contributory negligence.

In the view we take of the evidence, there are no palliating circumstances, nothing to relieve, nothing to prevent the conclusion of wanton negligence on the part of the defendant. If the jury believed that the plaintiff was not guilty of contributory negligence, and believed there was practically no evidence to that effect - and from the record they were entitled to do so - then, not only does it follow from the evidence in the record that the defendant was guilty of negligence, but it may even be said, within reason, that he was guilty of manslaughter.

It is urged for the defendant that the court erred in permitting certain evidence to be introduced by Joseph Burns, the police officer, concerning the testing of the brakes on the defendant's truck. In the view we take of the case, that whole subject was an entirely immaterial matter; and, further, the evidence put in as to the test was not of such import and moment as to justify overriding the verdict.

It is contended that the trial judge erred in giving certain instructions for the plaintiff, and in refusing cer-

tain instructions for the defendant. We have examined them, but we do not find any such errors committed as would justify a reversal.

For the reasons stated, the judgment will be affirmed.

JUDGMENT AFFIRMED.

HOLDEN AND WILSON, JJ. CONCUR.

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and the other side of the mountain, the mountain is very high and the other side is very low. The mountain is very high and the other side is very low. The mountain is very high and the other side is very low.

The mountain is very high and the other side is very low.

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406 - 32347

CHARLOTTE OELSCHLAGEL,

Appellee,

v.

MOIR HOTEL COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On March 30, 1926, Charlotte Oelschlagel, as plaintiff, began suit in the Municipal Court, against the Moir Hotel Company, as defendant, for a balance claimed to be due for a breach of a contract for personal services.

There was a trial before the court, with a jury, and a verdict and judgment in favor of the plaintiff, and against the defendant, in the sum of \$7,500.00. This appeal is from that judgment.

The statement of claim sets up a written contract, dated March 6, 1917, between Margaret Oelschlagel - purporting to act as mother and guardian of the plaintiff - and the defendant, which provides, among other things, that the plaintiff was to give skating exhibitions in the Terrace Gardens of the Morrison Hotel, for a period of twenty weeks, beginning on May 14, 1917, and ending October 1, 1917, at a salary of \$1500.00 a week, payable in advance.

The statement of claim sets up further that the contract was made for the use and benefit of the plaintiff,

844-1-688

100 - 1000

EXHIBIT NO. 1
BY COUNSEL

STATE OF NEW YORK
IN SENATE

Opinion filed May 8, 1928.

THE SENATE
of the court.

On March 30, 1928, the court delivered its opinion in the case of the People vs. [Name], wherein the court found in favor of the defendant, and the court ordered that the defendant be discharged.

There was a trial before the court, with a jury, and a verdict and judgment in favor of the defendant, and the court ordered that the defendant be discharged.

The statement of claim sets up a written contract, dated March 8, 1917, between the plaintiff and the defendant, which provides, among other things, that the plaintiff was to give certain exhibitions in the Town of [Name] on May 16, 1917, and ending on May 17, 1917, at a salary of \$100.00 a week, payable in advance.

The statement of claim sets up further that the contract was made for the use and benefit of the plaintiff.

who was, at the time, a minor, under the age of twenty-one years, and who has since attained her majority; that the plaintiff entered into the performance of her contract, and received therefor the sum of \$1500.00 per week, for the period from May 14, until June 25, 1917, or a total of \$9,000.00; that on June 25, 1917, the defendant refused and failed to pay the plaintiff the sum of \$1500.00 in advance for her further services under her contract for the week beginning June 25, and refused to permit her to perform further services under the terms of the contract.

The affidavit of merits sets up that the plaintiff gave performances at the defendant's place of business until on or about June 25, 1917; that she then refused, without any just cause, to continue to perform further services for the defendant; that the plaintiff's employment was thereupon terminated because of her refusal.

In the affidavit of merits it is denied that the defendant refused to permit the plaintiff to continue her performances; denied that the plaintiff was ready, willing and able to give the performances; denied that the plaintiff, after her refusal to perform, presented herself at the defendant's place of business for the purpose of rendering services.

It is further alleged that throughout the period from June 25, 1917 to October 1, 1917, the plaintiff was a minor; that her father and mother were both living; that as a result, the plaintiff was not entitled to receive anything which she might earn by services to be performed and could not suffer any damage through a failure to use and

the way, at the time, a minor, under the age of twenty-one years, and who has since attained her majority; that the plaintiff entered into a performance of her contract, and received therefor the sum of \$1500.00 per week, for the period from May 14, until June 25, 1917, or a total of \$5,000.00; that on June 25, 1917, the defendant refused and failed to pay the plaintiff the sum of \$1500.00 in advance for her further services under her contract for the week beginning June 25, and refused to permit her to perform further services under the terms of the contract.

The affidavit of the plaintiff sets up that the plaintiff gave performance of the defendant's place of business until on or about June 25, 1917; that she then refused, without any just cause, to continue to perform further services for the defendant; that the plaintiff's employment was terminated because of her refusal.

In the affidavit of the plaintiff it is stated that the defendant refused to permit the plaintiff to continue her performance; denied that the plaintiff was ready, willing and able to give the defendant service; denied that the defendant refused her services to perform, procured herself at the defendant's place of business for the purpose of rendering services.

It is further alleged that in August the period from June 25, 1917 to October 1, 1917, the plaintiff was a party to the defendant's business, and that the plaintiff was not entitled to receive any thing which she might have been entitled to receive and could not collect any damages from the defendant for the same.

pay for her services; that at the time when Margaret Oelschlagel, the mother of the plaintiff, executed the written contract, Wilhelm Oelschlagel, the father of the plaintiff, was living, and that he only was entitled to the plaintiff's services, and that therefore no rights to the plaintiff's services could be acquired by an instrument signed by Margaret Oelschlagel, and as a contract, the instrument established no right to such services and that it lacked consideration and mutuality.

It is further alleged therein that for a considerable period between June 25, 1917 and October 1, 1917, the plaintiff was profitably employed in rendering similar services to those provided for in the contract in question, and that she might have secured other employment equally remunerative throughout the entire period during which it is claimed that the defendant refused to employ her.

The written contract, by reason of which this controversy arises, is as follows:

"This agreement Made and Entered Into this sixty (six) day of March, 1917, at Cleveland, Ohio, by and between Moir Hotel Company, party of the first part; and Mrs. Margaret Oelschlagel, mother and guardian of the well known and famous ice-skater 'Charlotte,' party of the second part.

It Is Agreed between the parties hereto that the said party of the first part shall engage Miss Charlotte, the daughter of the said second party from May 14th for a period of twenty (20) weeks.

The Party of the First Part Agrees to pay to Miss Charlotte during the term of her engagement as stipulated above a salary of fifteen hundred Dollars - (\$1500. per week; said salary to be paid every Sunday in advance.

Miss Charlotte agrees to appear in three (3) performances daily; and two (2) performances on Sundays; also further agrees to be present at rehearsals

...for the first time; that at the time when ...
...the member of the plaintiff, ...
...the member of the plaintiff, ...
...plaintiff, was living, and that he only was entitled to
...the plaintiff's services, and that therefore no right
...to the plaintiff's services could be assigned by an ...
...went signed by ...
...the instrument established no right to such services and
...that it lacked consideration and executory.

It is further alleged therein that for a con-
siderable period between June 25, 1917 and October 1,
1917, the plaintiff was not; butly engaged in rendering
similar services to those provided for in the contract
in question, and that the right have secured other employ-
ment equally remunerative throughout the entire period
during which it is alleged that the defendant refused to
employ her.

The written contract, by reason of which this
controversy arises, is as follows:

"This agreement made and entered into this sixth (6th)
day of March, 1917, by and between ...
...and Mrs. ...
...of the well known and famous ...
...party of the second part.
It is ...
...said party of the first part shall engage ...
...lower, the duration of the said second party ...
...myself for a period of ...
...The party of the first part agrees to pay to ...
...Operative during the term of their engagement as
...estimated above a salary of fifteen hundred dol-
lars - \$1500. per week; said salary to be paid every
Sunday in advance.
Also ...
...also ...
...also ...

whenever necessary.

It is Further Understood and Agreed that the said party of the first part will pay the railroad fare for three (3) persons of the said party of the second part from New York to Chicago.

In Witness Whereof, the parties hereto have signed their names, this sixty (sic) day of March, 1917.

Margaret Oelschlaegel

Moir Hotel Co.

Hugo Brumlik."

The plaintiff under the contract in question, gave her first performance in the Terrace Gardens, at the Morrison Hotel, on May 15, 1917, and continued to perform there until June 25, 1917. She testified that she was born in August, 1898, and had worked as a professional ice-skater since she was ten years of age; that she skated in New York at the New York Hippodrome for two seasons 1915-1916 and 1916-1917. She further testified that she first met Brumlik ~~xxxxxxx~~ ~~contract~~ at the Kaiserhoff Hotel in Chicago while carrying out an engagement at the Auditorium, in the winter of 1917. On June 25, 1917, two other skaters, Habke and Lamb began an engagement at the Terrace Gardens.

The plaintiff was paid \$1500.00 a week from the beginning of her engagement until June 25, 1917. She testified that on June 25, 1917, she went to the cashier's window and asked for her check, and was told by the cashier that he had no order to give her a check; that she then went to Moir's office, and that he sent her to Brumlik, who led the orchestra and was the manager of the entertainment; that she then told Brumlik what Moir had said, and that he told her she was through, using the German expression, "Du bist fertig;" that when she asked him the reason, he said that he did not know; that she remained at the Hotel three days after June 25, 1917,

and then began to look for work; that the first work she got after that was at the end of October, at the Sherman Hotel, for which she received a salary of \$500.00 a week.

Brumlik, the manager of the entertainment, testified that he did not tell the plaintiff that she was through, but on the contrary requested her to remain; that she refused to do so, giving as a reason the presence of Babke and Lamb; and Rice, the Treasurer of the defendant, testified that he had always given the plaintiff her pay check after the show on Monday afternoon of each week; that the checks were made out in the regular course of business on Monday morning; that he had a check made out to the order of the plaintiff on Monday morning, June 25, 1917; that when the plaintiff and her father called for her check in the afternoon, after the show, he told her he could not give it to her, as she had refused to go on with the show; that she replied she would not go on while Babke and Lamb were on the bill. He further testified that he tore the signature off the check when he received word that the plaintiff had refused to give her performance; that he did not tell the plaintiff he had not received an order to make out her check.

One Jackson, a booking agent, testified that the plaintiff came to his office during May or June, 1917, in an endeavor to get him to find employment for her, but that he was unsuccessful in doing so.

To reverse the judgment it is urged for the defendant (1) that there was no privity of contract between the plaintiff and the defendant; (2) that the verdict for the plaintiff was against the clear preponderance of the evidence; (3) that the court erred in its rulings on evidence; and (4)

and then began to look for work; that the first work she
got after that was at the end of October, at the Sherman Hotel,
for which she received a salary of \$200.00 a week.

Finally, the manager of the entertainment, testified

that he did not call the plaintiff that she was through, but
on the contrary requested her to remain; that she refused to
do so, giving as a reason the presence of her husband and
Miss, the Treasurer of the defendant, testified that he had

always given the plaintiff her pay check after the show on

Monday afternoon of each week; that the checks were made out in
the regular course of business on Monday morning; that he had
a check made out to the order of the plaintiff on Monday

morning, June 22, 1927; that when the plaintiff came her father

called for her check in the afternoon, after the show, he told

her he could not give it to her, as she had refused to go on

with the show; that she replied she would not go on while he

and she were on the bill. He further testified that he tore

the signature off the check when he received word that the

plaintiff had returned to give her no more money; that he did not

tell the plaintiff he had not received an order to take out

her check.

One Johnson, a bookie agent, testified that the

plaintiff came to his office during May or June, 1927, in

an endeavor to get him to loan equipment for her, but that

he was unsuccessful in doing so.

To reverse the judgment it is argued for the defendant

(1) that there was no privity of contract between the plain-

tiff and the defendant; (2) that the verdict for the plaintiff

was against the clear preponderance of the evidence; (3)

that the court erred in its ruling on evidence; and (4)

that the court erred in instructing the jury that in assessing the plaintiff's damages, interest should be allowed.

(1) It is the law in this State that any one for whose benefit a contract is made, may sue thereon in his own name. The written contract here is signed by Margaret Oelschlagel, the mother of Charlotte, and by the Moir Hotel Co. and Hugo Brumlik. In Dean, use, etc. v. Walker, 107 Ill. 540, the court said:

"It is a familiar rule, and one well sustained by authority, that where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon it. It is not necessary in such a case that there should be any consideration moving from the third person, for whose benefit the promise is made, or that there should be any privity between them. The conveyance of the land is the consideration for the promise, and the fact that the consideration moves from the mortgagor is a matter of no moment. This is well illustrated in Brown v. Byar, 7 Cush. 337, where it is said: 'Upon the principle of law long recognized and clearly established, that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement, - that it does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded.'"

In the case of Torpe v. Jahn, 177 Ill. App. 85, the court said:

"At common law the rule is that where the promise is made under seal and the action must be debt or covenant, then it must be brought in the name of the party to the instrument, but in Webster v. Fleming, 178 Ill. 140, and Harts v. Emery, 184 Ill. 580, it was held that under our Practice Act the action may be brought in

that the party was in fact a party to the conspiracy, interest should be

THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535

Walter J. ... the ... of ... and ...

[illegible][illegible]

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have been afflicted by a severe drought. The President expresses his sympathy for the suffering and his hope that the Congress will take prompt action to relieve the distress.

the name of the party for whose benefit the promise is made, although the contract is under seal and the language used in Harris v. McCormick, 132 Ill. 104, is criticised in Webster v. Fleming, *supra*. In Cobb v. Heron, 180 Ill. 49, 54, it is said: "Wherever the pleas raise the question of no consideration moving from the appellee for the undertaking of appellant, it is enough to say that privity or consideration between a promisor and a third person, who is a beneficiary, need not exist to support the promise, provided there is a valuable consideration for the promise as between the principal parties to the undertaking."

In our judgment, considering the written contract in question, there is no doubt but that the daughter, Charlotte, had a good and valid right to maintain her action on the contract, being as she was, the third party for whose actual benefit the contract was entered into. (Williston on Contracts, Sec. 357.)

Williston says, Section 368, "A large majority of the States allow a sole beneficiary to sue at law;" and in a note to that statement cites many cases in various states, and among them the following: Lawrence v. Oglesby, 178 Ill. 123 and Riepe v. Schmidt, 199 Ill. App. 129.

(2) As to the contention that the verdict was manifestly against the weight of the evidence, it is urged for the defendant that the plaintiff's testimony is uncorroborated, and that it is opposed by the testimony of the defendant's witnesses. It would be a work of supererogation to set up here in detail the evidence pertaining to her alleged discharge. The evidence on that subject was directly conflicting and was properly submitted to the jury, and they have found in her favor. We have examined the evidence, and do not find any such inconsistencies and discrepancies as would in any way justify a court of review

The name of the party for whom the witness is made, although the contract is under seal and the instrument was in Wright v. Wright, 122 Ill. 104, is excluded in Wright v. Wright, 122 Ill. 104, it is said: "whereas the witness raises the question of no consideration arising from the parties for the making of the instrument, it is enough to say that getting a consideration between a grantor and a third person, who is a bona fide purchaser, need not exist to support the instrument, provided there is a valuable consideration for the grantor as between the principal parties to the instrument."

is not judgment, considering the witness's testimony in question, there is no doubt but that the daughter, Charlotte, had a good and valid right to maintain her action on the contract, being on the one, the right party for whose estate benefits the contract was entered into. (Wright v. Wright, 122 Ill. 104.)

Wright says, Justice 305, "A large number of the states allow a wife to bring an action on the contract to that extent since many cases in various states and Wright v. Wright, 122 Ill. 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(2) As to the contention that the verdict was manifestly against the weight of the evidence, it is urged for the defendant that the plaintiff's testimony is uncorroborated, and that it is opposed by the testimony of the defendant's witnesses. It would be a work of supererogation to set up here in detail the evidence pertaining to her alleged dishonesty. The evidence on that subject was directly conflicting and was properly submitted to the jury, and they have found in her favor. We have viewed the evidence, and do not find any such inconsistency and discrepancy as would in any way justify a court of review.

in overriding the verdict of the jury. The jury may well have refused to believe the witnesses for the defendant and have given credit to the testimony of the plaintiff herself; and if they did so, we do not feel justified in holding that that would be clearly unreasonable. Not seeing the witnesses, we are, as to matters of credibility, very disadvantageously situated, compared with the jury.

(3) It is urged for the defendant that the trial judge erred in allowing improper cross-examination and impeachment of the witness Brumlik.

Considering what the record shows Brumlik testified to on direct-examination, we find nothing in the cross-examination that was erroneous. Many questions were propounded to him in order to lay the foundation for possible impeachment and so were entirely proper. The Illinois Central Railroad Co. v. Fada, 208 Ill. 523; Hirsch & Sons Iron Co. v. Coleman, 227 Ill. 149. Objection is made to conversations with one Campbell, but he was an officer of the defendant company and what he said was proper evidence and competent.

(4) As to interest. Section 2, Chapter 74, Cahill's Rev. Statutes provides,

"Creditors shall be allowed to receive at the rate of 5% per annum for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing."

Here the suit was upon an instrument in writing; and the jury was entitled to find the amount that was due on October 1, 1917, the date of the expiration of the contract, and add to that interest from October 1, 1917 to the

in overruling the verdict of the jury. The jury may well have believed as believed the witnesses for the defendant and have given credit to the testimony of the plaintiff himself; and if they did so, we do not feel justified in holding that that would be clearly unreasonable. Not seeing the witnesses, we are, as to matters of credibility, very inadequately situated, compared with the jury.

(3) It is urged for the defendant that the trial judge erred in allowing improper cross-examination and impeachment of the witness Hamilton.

Does not saying that the record shows Hamilton testified to an honest examination, we find nothing in the cross-examination that was erroneous. Many questions were asked pointed to him in order to lay the foundation for possible impeachment and he was entirely proper. The Hamilton v. Hamilton case, 100 Ill. 2d 111, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(4) As to interest, Section 5, Chapter 72,

which is the statute providing "creditors shall be allowed to receive of the estate of the decedent all claims against the estate, on any bond, bill, promissory note or other instrument of writing."

Here the suit was upon an instrument in writing and the jury was entitled to find the amount due on October 1, 1917, the date of the expiration of the term, and also to find interest from October 1, 1917 to the

date of their verdict. Reiseler, et al v. Stone, 131

Ill. 393. In the latter case the court said,

"Here the money was due on an instrument of writing, and while it had not been determined whether the amount should be \$150.00 or \$300.00 per month, yet the amount, whatever it was, being due on an instrument of writing, no reason is perceived why the true amount, when ascertained, should not bear interest from the time due."

For the reasons stated above, the judgment will be affirmed.

AFFIRMED.

HOLSON AND WILSON, JJ. CONCUR.

CAROLAN, GRAHAM & HOFFMAN, INC.,)
 a corporation,)

Appellee,)

v.)

J. D. RANKIN,)

Appellant.)

APPEAL FROM

MUNICIPAL COURT
 OF CHICAGO.

Opinion filed May 2, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Carolán, Graham & Hoffman, Inc. a corporation, as plaintiff, began suit in the Municipal Court against J. D. Rankin, as defendant, for an insurance premium amounting to \$142.50. There was a trial before the court, without a jury, and a judgment in favor of the plaintiff and against the defendant for that sum. This appeal is therefrom.

The plaintiff recites in its statement of claim the following:- "Its claim is for the sum of \$142.50, being the premium on the bond in the amount of \$2500.00, in favor of the Village of Berkeley, and issued at defendant's special instance and request. Plaintiff further claims interest on said sum of \$142.50 at 6% from December 18, 1925 until the date of judgment herein; that although often requested, the defendant wholly failed and refused to pay said sum, or any part thereof; wherefore the plaintiff sues."

There was an affidavit of claim attached to the statement of claim.

CAROLAN, GEORGE A. & SONS, INC.,
a corporation.

APPEAL FROM

MUNICIPAL COURT

APPEAL FROM

APPEAL FROM

Opinion filed May 8, 1938.

MR. JUSTICE JAMES TAYLOR delivered the opinion
of the court.

Carolans, George A. & Sons, Inc., a corporation, as
plaintiff, began suit in the Municipal Court against J. D.
Harris, as defendant, for an insurance premium amounting to
\$100.00. There was a trial before the court, without jury,
and a judgment in favor of the plaintiff and against the de-
fendant for that sum. This appeal is therefrom.

The plaintiff recites in its statement of claim
the following: "Its claim is for the sum of \$100.00, being
the premium on the bond in the amount of \$2500.00, in favor
of the Village of Berkeley, and issued as defendant's special
insurance and request. Plaintiff further claims interest on
said sum of \$100.00 at 5% from December 10, 1935 until the
date of judgment herein; that although often requested, the
defendant wholly failed and refused to pay said sum, or any
part thereof, wherefore the plaintiff sues."

There was an affidavit of claim attached to the

statement of claim.

On January 24, 1927, the defendant filed an affidavit of merits, in which it is alleged that when application was made to the plaintiff for a bond, it was explained that it was only needed in anticipation that the Village of Berkeley would require a bond for work upon which the defendant was submitting a bid, and that it was agreed between the parties that should the Village refuse the bid, or for some other reason not require a bond to be filed with the Village Clerk, then no liability should accrue for a premium; that the work was in fact done by the defendant for the Village without his being required to file a bond for his work, and therefore no liability for any premium accrued on account of any such bond; that it was agreed in the event such a bond should be needed and the defendant undertook to do certain work for the Village, a credit would be allowed to the defendant for the amount of the premium on the bonds of the sub-contractors under the defendant, if such bonds were executed by the plaintiff; that the defendant undertook to do the work for the Village, and a subcontractor's bond was executed by the plaintiff for one Thomas Chapman, the premium on which amounted to \$40.50, for which amount the defendant is entitled to a credit in case he is liable for any premium such as the plaintiff claims; that no agreement was ever made concerning the amount of the premium and the defendant never promised to pay any premium of any certain amount, and that the amount charged for the premium was exorbitant.

At the trial, one King Cook, who was connected with the plaintiff's firm, testified for the plaintiff,

On January 26, 1927, the defendant filed an affidavit of service, in which it is alleged that when application was made to the plaintiff for a bond, it was explained that it was only needed in anticipation that the Village of Berkeley would require a bond for work upon which the defendant was undertaking a bid, and that it was agreed between the parties that should the Village refuse the bid, or for some other reason not require a bond to be filed with the Village Board, then no liability should accrue for a premium, that the work was in fact done by the defendant for the Village without his being required to file a bond for his work, and therefore no liability for any premium accrued on account of any such bond, that it was agreed in the event such a bond should be required, the defendant undertook to do certain work for the Village, a credit would be allowed to the defendant for the amount of the premium on the basis of the sub-contractors under the defendant, if such bonds were executed by the plaintiff; that the defendant went back to do the work for the Village, and a sub-contractor's bond was executed by the plaintiff for one Thomas Morgan, the premium on which amounted to \$40.00, for which amount the defendant is entitled to a credit in case he is liable for any premium such as the plaintiff claims; that no agreement was ever made concerning the amount of the premium and the defendant never promised to pay any premium of any certain amount, and that the amount charged for the premium was exorbitant.

At the trial, one Mary Cook, who was connected with the plaintiff's firm, testified for the plaintiff.

and George E. Billett and defendant Rankin, testified for the defendant, and certain exhibits were introduced in evidence.

The evidence shows that the premium of \$142.50, for which the suit was brought was for a bond to be given by the defendant Rankin, as principal, to the Village of Berkeley for the carrying out of certain work for the Village by Rankin.

Shortly before November 28, 1925, certain negotiations were entered into between Rankin, on the one hand, and the plaintiffs on the other, for the furnishing of a bond. Those negotiations resulted in the plaintiffs furnishing a bond covering the erection of certain buildings and installing certain equipment in connection with the waterworks for the Village of Berkeley, and also the maintenance of the improvements. A bond, dated November 28, 1925, was drawn up, but it was considered by Rankin as having been subsequently cancelled.

The bond of November 28, 1925, was submitted by Rankin to Hancock, engineer for the Village of Berkeley, and Hancock told Rankin that he desired two separate forms of bond, one covering the performance of the contract for erection of the waterworks improvements by Rankin for the Village of Berkeley, and another separate bond covering the maintenance by Rankin of the improvements after they were erected. Rankin also advised Cook, Vice-President of the plaintiff corporation, of his desiring separate bonds, and accordingly, upon request of Hancock and Rankin, Cook prepared

and George E. Elliott and defendant Rankin, testified
that the defendant, and certain exhibits were introduced
in evidence.

The evidence shows that the premises of 1112, 1114,
for which the suit was brought was for a bond to be given
by the defendant Rankin, as principal, to the Village of
Berkley for the carrying out of certain work for the
Village by Rankin.

Shortly before November 28, 1935, certain matters

claim were entered into between Rankin, on the one hand, and the
plaintiffs on the other, for the furnishing of a bond. Those
negotiations resulted in the plaintiffs furnishing a bond
covering the erection of certain buildings and installation
certain equipment in connection with the waterworks for the
Village of Berkley, and also the maintenance of the water-
works. A bond, dated November 28, 1935, was drawn up, and
it was executed by Rankin as having been subsequently
cancelled.

The bond of November 28, 1935, was submitted by
Rankin to the Village of Berkley, and
Rankin told Rankin that he desired two separate forms of
bond, covering the performance of the contract for
erection of the waterworks improvements by Rankin for the
Village of Berkley, and another separate bond covering
the maintenance by Rankin of the improvements after they
were erected. Rankin also advised that, Vice-President of
the Village Corporation, of the existing separate bonds, and
consequently, upon request of Rankin and Rankin, both parties

a new and second bond covering performance only. A maintenance bond was to be prepared after completion of the waterworks.

On December 19, 1925, the second bond was sent by Cook to Billett, attorney for the Village, for examination. It was received by Billett on December 21, 1925, and was dated December 18, 1925. On the same day, Billett returned the second bond, the one dated December 18, 1925, to the plaintiff, with a letter. In that letter Billett stated that the bond dated December 18, 1925, had not been signed by Rankin, and that the power of attorney of the plaintiffs had not been attached. The original of that letter was received by Cook, together with the bond. In reply to Billett's letter, Cook wrote to Billett on December 23, describing the rates of premium on the separate kinds of bonds, and on the same day, Cook, by his Secretary, Nelson, sent the second bond, that of December 18, 1925, to Rankin for his signature, with a letter. On December 24, 1925, the plaintiff billed Rankin, the defendant, for the premium of the bond.

Sometime in the latter part of December, 1925, difficulty had developed in the progress of the plans for the waterworks, which lasted for a number of months, and until the end of May, 1926; and in consequence, there was no need for the second bond during that time. On April 20, 1926, the plaintiff wrote to the defendant, requesting payment of the premium on the second bond, dated December 18, 1925, and on June 3, 1926, wrote again.

A new and revised bond covering the same was prepared and the same was to be prepared at the expiration of the term.

On December 10, 1935, the second bond was made by John H. Elliott, attorney for the Village, for examination. It was received by Elliott on December 11, 1935, and was dated December 10, 1935. On the same day, Elliott returned the second bond, the one dated December 10, 1935, to the claimant, with a letter, in that letter Elliott stated that the bond dated December 10, 1935, had not been signed by Elliott, and that the power of attorney of the claimant had not been attached. The original of that letter was received by Elliott, together with the bond, in reply to Elliott's letter. Elliott wrote to Elliott on December 11, describing the terms of premium on the second bond of bonds, and on the same day, Elliott, by his secretary, returned the second bond, that of December 10, 1935, to Elliott for his signature, with a letter. On December 11, 1935, the claimant signed the bond, the defendant, for the premium of the bond.

Continued in the latter part of December, 1935, Elliott had developed in the progress of the plan for the waterworks, which lasted for a number of months, and until the end of the year, 1935, Elliott, by his secretary, returned the second bond during that time, on April 30, 1936, the claimant wrote to the defendant, requesting payment of the premium on the second bond, dated January 10, 1936, and on June 5, 1936, wrote again.

The first week of June, it developed that Hancock, with the authority of the Village, ordered Rankin to proceed with the waterworks, and did not require Rankin to furnish a bond covering his work. "Upon learning of this situation, Mr. Rankin returned to the plaintiff, by letter, the second bond, dated December 18, 1925, which, with the second bond, was received by King Cook for the plaintiff. The second bond, dated December 18, 1925, had never been submitted or delivered to the Village of Berkeley, or to its officers or agents; had never been filed in the office of the Clerk of the Village of Berkeley, but had remained in the possession of Rankin until returned to the plaintiff on June 5, 1926, enclosed with a letter of the same date." "Rankin considered, in the event the second bond had been used by Rankin, and delivered to the Village, that he was entitled to a credit in the amount of \$40.50 for the premium on a bond signed by plaintiff for one Chapman, such credit applying on Rankin's premium. He believed he had an understanding with King Cook to that effect."

In our judgment, the evidence does not show that the Insurance Company became liable as surety upon the bond applied for, that is the one of December 18, 1925, and that therefore the plaintiff was not entitled to recover. The plaintiff in his statement of claim claims the sum of \$142.50 "being the premium on the bond in the amount of \$9,500.00, in favor of the Village of Berkeley," and issued at defendant's request, and claims interest on \$142.50 from December 18, 1925. Of course, the Insurance Company did not become liable as surety on the first bond, because it was never delivered to the obligee. It was, in fact,

The first book of land in the village of Khamin was
Hannan, with the authority of the village, ordered Khamin
to proceed with the waterworks, and did not require Khamin to
furnish a bond covering his work. Upon learning of this
situation, Mr. Khamin returned to the plaintiff, by letter,
the second bond, dated December 16, 1935, with the
second bond was received by King Cook for the plaintiff.
The second bond, dated December 16, 1935, had never been
submitted or delivered to the village of Khamin, or to
the village or agent; had never been filed in the office
of the Clerk of the Village of Khamin; and had remained
in the possession of Khamin until returned to the plaintiff
on June 1, 1936, enclosed with a letter of the same date.
Khamin contended, in the event the second bond had been
used by Khamin, and delivered to the village, that he was
entitled to a credit in the amount of \$40.00 for the premium
on a bond signed by plaintiff for the village, such credit
applying on Khamin's premium. He testified he had an un-
standing with King Cook to that effect.

In my judgment, the evidence does not show that
the Insurance Company became liable as surety upon the
bond applied for, that is the one of December 16, 1935, and
that therefore the plaintiff was not entitled to recover.
The plaintiff in his statement of claim states the sum of
\$100.00 being the premium on the bond in the amount of
\$2,500.00, in favor of the village of Khamin, and
issued as defendant's reward, and claims interest on \$100.00
from December 16, 1935. Of course, the Insurance Company
did not become liable as surety on the first bond, but
it was never delivered to the village, it was, in 1935,

rejected by the engineer of the Village of Berkeley. The first bond, therefore, is eliminated from consideration. It had never been delivered to the Village of Berkeley, or to its officers or agents. As to the second bond, we quote from the narrative stated by the evidence. "Upon learning of this situation, Mr. Rankin returned to the plaintiff by letter, the second bond, dated December 18, 1925, which, with the second bond, was received by King Cook for the plaintiff." That bond had never been submitted by Rankin or delivered to the Village of Berkeley, or to its officers or agents, and was never filed in the office of the Clerk of the Village. No delivery, therefore, had ever taken place, and that being the situation of fact, the Insurance Company did not become surety on either bond, and not having become surety, there was no liability on the part of the defendant for the premium. In The Empire State Surety Company v. Schillinger Bros. 167 Ill. App. 632, the court said,

"An inspection of the application and bond makes it clear that the Bosch-Ryan Grain Co. was the obligee in the bond, which was issued for its benefit. If, for any reason, an obligee in a bond refuses to accept it, the bond does not become operative and no liability on the part of the maker thereunder arises. * * * It is too clear to require argument or citation of authorities that by the continued refusal of the Bosch-Ryan Grain Co., for whose benefit the bond was executed, the bond in question had no validity, and the Surety Company never became liable thereon."

In that case, where the question was concerning the liability for the premiums on the bond, the court found that as the Surety Company never became liable as surety, no liability existed for the payment of the premium on the bond. In the

reported by the engineer of the Village of Berkeley.
The first bond, the value, is estimated from the evidence.
It had never been delivered to the Village of Berkeley.
as to the officers or agents. As to the second bond, as
stated from the narrative stated by the evidence. "Upon
learning of this situation, Mr. Rankin returned to the
plaintiff by letter, the second bond, dated December 15,
1932, and with the second bond, was received by him on
the 16th. That bond had never been submitted
by Rankin or delivered to the Village of Berkeley, or to
the officers or agents, and was never filed in the office
of the Clerk of the Village. No delivery, therefore, had
ever taken place, and that being the situation of fact, the
Insurance Company did not become surety on either bond,
and not having become surety, there was no liability on
the part of the defendant for the premium. In the
case of the second bond, the same result was reached.

"An inspection of the application and bond made
it clear that the bond was not a bond, as the
signature in the bond, which was issued for the
benefit of the Village of Berkeley, was not a bond
because to accept it, the bond was not a bond
operated and no liability on the part of the
insurance company existed. It is a bond of the
Village of Berkeley, or a bond of the Village of
Berkeley, or a bond of the Village of Berkeley,
that by the contract of the bond was not a
bond, for which the bond was not a bond, and
which, the bond in question had no validity, and
the insurance company never became liable thereon."

In that case, where the question was concerning the liability
for the premium on the bond, the court found that as the
insurance company never became liable as surety, no liability
existed for the payment of the premium on the bond. In the

instant case, the Insurance Company undertook to become liable as surety on a certain bond, for which the defendant promised to pay a premium of \$142.50, but as the Insurance Company at no time was liable as surety, it was not entitled to compensation.

For the reasons stated the judgment will be reversed and judgment will be entered here for the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

HOLDOM AND WILSON, JJ. CONCUR.

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PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JAMES H. HOOPER,

Plaintiff in Error.

SHOWN TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 3, 1926.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion
of the court.

On December 9, 1925, a claim of the first class
was filed in the Municipal Court in the name of the People
of the State of Illinois against Caroline Means and James H.
Hooper, as defendants, which set forth that on February 8,
1925, they entered into an obligation with the People; that
Caroline Means was "legally in custody, charged with the crime
of larceny and was released from said custody by reason of
giving recognizance;" that on March 25, 1925, the case was
called for trial and Caroline Means and James H. Hooper,
being three times called for trial in open court and ordered
to bring in the body of Caroline Means into court, as by the
terms of the obligation he was bound to do, came not, but
made default; and it was ordered by the court that the
recognizance be forfeited.

To the claim there was attached an affidavit, which
stated that the plaintiff's claim was for money due from the
defendants by reason of their failure to carry out the
provisions of the recognizance.

On December 9, 1925, a summons was issued, directed to

James H. Hooper, and was served on him on December 18, 1925. On December 30, 1925, James H. Hooper entered his appearance pro se. On the same date, he filed an affidavit of merits, setting up "that the case of the People of the State of Illinois v. Caroline Means was not called in Branch 32 in the Municipal Court of Chicago, on the 18th day of February, 1925, nor on March 25, 1925, in said Branch, and that said recognizance was not then and there forfeited, as alleged in the statement of claim and has not at any time been forfeited, and that Caroline Means is not joined as defendant, and that no summons was issued as to her."

On December 29, 1925, there was a trial before the court with/a ^{out} jury. At the trial, the bond in question was introduced in evidence. It is entitled, "Criminal Recognizance with Surety and Schedule." The bond recited that Caroline Means, as principal and James H. Hooper, as surety, jointly and severally acknowledged themselves to owe and be indebted unto the People of the State of Illinois in the penal sum of \$1500.00, to be levied of their respective goods and chattels, lands and tenements, respectively, in default be made in the premises and conditions. The bond further recites that, whereas Caroline Means had been taken into custody and charged with larceny, the condition of the recognizance was that if she should be and personally appear before the Municipal Court of Chicago, at a session thereof to be held at Branch No. 32, located at 2742 Sheffield Avenue, in Chicago, or before any other branch of the Court,

1892-1893

to which the cause might be transferred, or might be pending, then and there to answer unto the People of the State of Illinois upon the charge in question, and should abide by the order of the court and not depart without leave, then the recognizance and the bond should be void; otherwise it should remain in full force and virtue. The bond was dated February 6, 1925, and signed by Caroline Means and James H. Hooper. The bond was acknowledged on the same date before one of the Judges of the Municipal Court.

Counsel for the state offered in evidence the "Half Sheet," and "the record of the Court in People of the State of Illinois vs. Caroline Means, criminal, No. 538401." Counsel for the State then stated, "I offer all of the records here in this case, the jury waiver, the complaint, the half sheet and all the entries thereon."

Defendant Hooper then objected, on the ground that no proper judgment of forfeiture was shown. The court then stated, "Objection overruled. Finding against the defendant in the sum of \$1500.00 and judgment on the finding. The defendant then stated, "To which I except." The Court then stated, "Judgment in the amount of the bond." The record further shows the following: "Thereupon the Court entered judgment in the sum of \$1,500.00, to which entry of judgment, the defendant objected and excepted. Motion in arrest of judgment was denied and exception taken." This appeal is by defendant Hooper from that judgment.

It is urged for the defendant Hooper that "A suit to recover the penalty in a recognizance is a suit to recover a penalty and is not a suit to recover for breach of a contract; that the statutes provide a remedy by scire facias and that that remedy should be followed; that a recognizance is in the nature of a judgment confessed of record; that the Municipal Court has no jurisdiction of a case of the first class to recover a penalty.

In our judgment, the suit is one in debt, and there is no question but that the Municipal Court has jurisdiction in cases of debt, or suits on a contract for sums over \$1,000.00. (Chap. 37, Para. 390, Cahill's Rev. Stats. 1935) In Pate v. People, 15 Ill. 221, the Court said,

"It is well settled, that debt will lie upon a recognizance. It is an obligation to pay a sum certain."

It is further contended that the record in the larceny case does not show that a judgment was ever entered against the defendant Hooper.

There is no claim by Hooper that he surrendered his principal. As the court said in the Pate case (*supra*), "He may make the surrender and discharge the recognizance at any time before judgment is obtained in the action of debt." In that case the Court said further, "In this kind of action * * * the whole amount of the recognizance is recoverable. It matters not what may be the form of the remedy. The sum named in the recognizance is forfeited by a failure to perform the condition." Where ⁱⁿ a suit in debt upon a recognizance, the statement of claim alleges

It is urged for the following reasons that

"A suit to recover the penalty in a proceeding

(1) is not an action in tort; (2) is not an action

in contract; (3) is not an action in property; and (4)

is not an action in which the plaintiff is entitled to

specific performance of a contract; and a recovery in the

nature of a judgment rendered in equity; and the

plaintiff is not entitled to a writ of mandamus to

compel the defendant to pay the penalty.

It is further urged that it is not an action in tort

because the plaintiff is not entitled to recover damages

for injury to his person or property or for a wrongful act

done to him or to his property, but that the action is

one in which the plaintiff is entitled to recover the

penalty for the violation of a law.

It is further urged that the action is not one in which

the plaintiff is entitled to recover damages for injury

to his person or property or for a wrongful act done

to him or to his property, but that the action is

one in which the plaintiff is entitled to recover the

penalty for the violation of a law.

It is further urged that the action is not one in which

the plaintiff is entitled to recover damages for injury

to his person or property or for a wrongful act done

to him or to his property, but that the action is

one in which the plaintiff is entitled to recover the

penalty for the violation of a law.

It is further urged that the action is not one in which

the plaintiff is entitled to recover damages for injury

facts showing a breach, as here, that is, that the principal failed to appear; and the affidavit of merits by the surety does not deny the failure, the question of forfeiture does not arise, and need not be proven.

The half sheet, which was offered in evidence under the title, "Caroline Means," and with the number 336401, contained the following: -"March 25, 1925, Judge John A. Hughes, Recognizance of defendant and James H. Hooper, surety, forfeited, Warrant orders vs. defendant."

Defendant Hooper, in his brief, contends that there is no recital that the plaintiff was present, nor that the defendant was absent, that as far as the recital is concerned, the principal defendant Caroline Means might have been present in open court, ready for trial; that it was not shown that she was defaulted, nor was it shown that the surety was present. Considering the contents of the statement of claim and affidavit; the appearance of the defendant; the contents of the affidavit of merits, which merely sets up as a defense that the recognizance was not forfeited, as alleged in the statement of claim, and that Caroline Means was not joined as defendant, and that no summons was issued as to her; that there was introduced in evidence the record in the larceny case, which has not been produced here, that is, does not appear in the bill of exceptions; and the language used in the half sheet, we are of the opinion that a

prima facie case was made out, and that the plaintiff was entitled to judgment. Further, if the defendant saw fit to test the forfeiture, or to claim that there was no ground for a forfeiture, and that the plaintiff was not entitled to sue on the bond in debt, the obligation was upon him to make proof of these facts. That he failed to do.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDON AND WILSON, JJ. CONCUR.

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WALTER HATLEY,

Plaintiff in Error,

v.

MAGGIE HATLEY,

Defendant in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 2, 1928.

MR. JUSTICE HOLCOM delivered the opinion of the court.

Complainant, Walter Hatley, filed his bill for divorce against his wife Maggie Hatley, alleging inter alia the residence of complainant in Chicago, Cook County, and that he was a resident of the State of Illinois and of Cook County for more than one year before the filing of the bill; that on August 28, 1920, in Kansas City, Missouri, he was joined in matrimony with the defendant, and that he lived and cohabited with her as her husband from that time until August 2, 1924; averring that he behaved himself as a husband should, and supported his wife according to the best of his means, and that on the date last aforesaid he became acquainted with facts in the bill set forth regarding the alleged adulterous conduct of his wife, since which time he refused to live and cohabit with her.

Each of the parties to the bill was the second spouse of the other. The bill avers that on May 4, 1924, and during the months of April, May, November and December, 1921 and January 1922, at Kansas City, Missouri, and at

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EX - 110

LEGAL COUNSEL

MEMORANDUM FOR THE ATTORNEY GENERAL

DEPT. OF JUSTICE

RE: [Illegible]

Reference is made to

Opinion filed May 2, 1936.

[Illegible text]

[Illegible text]

Complaint, which states, filed his bill for

divorce against the wife, [Illegible]

the name of defendant is [Illegible], Cook County, and that

he was a resident of the State of Illinois and of Cook County

for more than one year before the filing of the bill; that

on August 26, 1930, in Kansas City, Missouri, he was joined

in matrimony with the defendant, and that he lived and co-

habited with her as her husband from that time until August

2, 1934; asserting that he behaved himself as a husband should,

and supported his wife according to the best of his means, and

that on the date last aforesaid he became separated with

her in the bill and forth regarding the alleged adultery

and that of his wife, since which time he refused to live and

cohabit with her.

Each of the parties to the bill was the second

spouse of the other. The bill states that on May 4, 1934,

and during the month of April, May, June and September,

1931 and January 1932, at Kansas City, Missouri, and at

various other times and places since the marriage between complainant and defendant, defendant had committed adultery with one Fred Dabney, and had committed adultery at other times and places with persons unknown to complainant, and complainant prayed a dissolution of his marriage with defendant.

The defendant answering the bill denied all of the material averments thereof, saving the marriage and the cohabitation thereafter, and admits that on the 21st of August, 1924, complainant refused further to live and cohabit with defendant; denies acts of adultery with Fred Dabney, or any act of adultery on her part.

On a trial before the chancellor, after hearing the testimony of both parties, complainant's bill was dismissed for want of equity, from which complainant prosecutes this appeal, alleging various errors for reversal.

Complainant testified in his own behalf and called one James Proffitt as his witness. Proffitt testified that he lived in Kansas City and knew the complainant, also the defendant; that he visited at their home in Kansas City and worked around the house and during that time he saw Fred Dabney in the home of complainant during his absence; that he received no salary but worked for friendship; in April 1921 he saw Dabney at the home of complainant during his absence; that he would ring the bell and defendant would meet him at the door; that he would go in the house and sometimes go upstairs; that there were three rooms upstairs, one bedroom; that Dabney was upstairs on the first occasion, and that the witness went to the bathroom; he testified that he did not see Dabney up stairs after he arrived that morning.

various other times and places since the marriage between complainant and defendant, defendant had committed adultery with one Fred Emery, and had committed adultery at other times and places with persons unknown to complainant, and complainant prayed a dissolution of his marriage with defendant.

The defendant answered the bill denied all the material averments thereof, denying the marriage and the cohabitation therewith, and admits that on the 21st of August, 1904, a complaint was filed against him and co-defendant, charging with defendant, certain acts of adultery with Fred Emery, or any act of adultery on her part.

On a trial before the Chancellor, after hearing the testimony of both parties, complainant's bill was dismissed for want of equity, from which complainant prosecuted this appeal, alleging various errors for reversal.

Complainant testified in his own behalf and called one James Trotter as his witness. Trotter testified that he lived in Kansas City and knew the defendant, also the defendant, that he visited at their home in Kansas City and worked around the home and during that time he saw Fred Emery in the home of complainant during his absence; that he received no salary but worked for friendship; in April 1901 he saw Emery at the home of complainant during his absence; that he would ring the bell and defendant would meet him at the door; that he would go in the house and answer the door; that there were three rooms upstairs, one of which Fred Emery was upstairs on the first occasion, and that the witness went to the bedroom; he testified that he did not see Emery up stairs after he arrived that morning.

just heard him talking. He testified, "I couldn't see inside, but I figured it was he and Mrs. Hatley. I heard the voices in a bedroom, all three rooms upstairs were bedrooms." The second week in April he saw Dabney go into the house and that he saw defendant there, and that she and Dabney went upstairs; that he left that day before Dabney did about noon. At one time Mrs. Hatley had on her kimono; generally she had on her apron. The time after the first time he saw Dabney there defendant had on a house dress and her shoes; that Dabney was there during the months of April, May and June, 1921.

On cross-examination this witness testified that complainant was a Pullman porter, and that "he stayed in town only one day at a time." He also testified that the Kansas City residence was two stories with yellow front; the last time he was there was in June 1921, and it was being repaired. Mrs. Hatley had a daughter Viola by her first husband, they were all living in the house; that the daughter was in the house at times when the witness was there. The daughter is a school teacher teaching in the Wendell Phillips School.

Complainant Hatley testified that he was a railroad train porter for the Santa Fe for twenty-two years; that his headquarters were at 13th and State Streets, Chicago, and that his run was to Kansas City; that there were no children born of their marriage; that the house in Kansas City was his wife's house; that on one occasion he saw Dabney meet his wife and that he greeted her with a smile; that he saw her go into her cousin Gussie's home at the corner of Woodland

The first time he saw Kibbey there defendant had come home dressed as her usual; that Kibbey was there during the summer of 1901.

Kibbey did about noon. At one time Mrs. Kelly had no hat she and Kibbey went upstairs; that he felt that day before go into the house and that he saw defendant there, and that

"The second week in April he saw Kibbey again heard the voices in a bedroom, all three rooms upstairs included, but I figured it was he and Mrs. Kelley."

I don't recall him talking. He testified "I couldn't see"

...the complainant's wife testified that he was a well-known member of the ... and that she was in Kansas City ... children born of their marriage; that the house in Kansas City ... was his wife's house; that on one occasion he saw ... his wife and that he greeted her with a smile; that he saw ... her go into her cousin's house at the corner of ...

and Cottage; I saw something was wrong; she had a key and unlocked the door and complainant rushed to the door and knocked and pushed on it, then walked to Vine street and tried to find a policeman, but didn't, went back to the house where they were and told them to open the door; after that he returned home and saw her in front of him; he asked her what was the trouble "what are you doing"; that she got scared and ran into her room, pulled off her clothes and slammed the door, and said "Don't you come in here, I will shoot you, if you break that door open I will shoot you." He did not go into the room, he did not talk with her before leaving Kansas City at 7:45 that evening arriving in Chicago the next morning; that she left the same night over the Burlington.

We have searched complainant's testimony and have failed to find any evidence sustaining complainant's charges of adultery against his wife with Gabney or anyone else.

Defendant was examined in her own behalf and denied every charge and insinuation of adultery with Gabney or any one else. She testified that her daughter Viola Robinson owned the Kansas City residence where they all lived; she denied all of complainant's charges of improper marital conduct. She testified that the first time she saw the witness Proffitt was the day before in the court room; that he did not work for her in April 1921, and did not come to the house and spade up her garden in April, May and June, 1921; that he was never in her house, and she denied meeting Gabney in Kansas City in a house where her husband found her; that she had known Gabney for fourteen years, and also knew his wife; that her

and testified: I saw something was wrong; she had a key and
opened the door and immediately rushed to the door and
rushed and pushed on it, then walked to the street and
tried to find a policeman, but didn't, went back to the
house where they were and told them to open the door; after
that he returned home and saw her in front of him; he asked
her what was the trouble "what are you doing"; that she had
entered and ran into her room, pulled off her clothes and
altered the door, and said "Don't you come in here, I will
shoot you, if you open that door again I will shoot you."

He did not go into the room, he did not talk with her before
leaving Kansas City at 7:45 that evening arriving in Chicago
the next morning and was arrested the night following.
Chicago, Illinois.

We have received complaints, continuing and have
called to the attention of the Chicago Police Department
at Chicago, Illinois and will continue to follow up.

Every attempt was made to locate the woman at any
one time. She testified that her daughter Viola Robinson owned
the Kansas City residence where they all lived; she dated all
of complaints, a change of telephone number, contact. She
testified that the first time she saw the witness Proffitt
was the day before in the court room; that he did not work for
her in April 1931, and did not come to the house and stay up
her garden in April, May and June, 1931; that he was never
in her house, and she dated meeting him in Kansas City
in a house where her husband found her; that she had never
known her husband, and also knew his wife; that her

husband had given her no money since their separation in August, 1924.

Defendant's daughter testified supporting in the main her mother's testimony.

One William King, in the real estate business in Chicago, testified that he had known Gabney for 20 years and the complainant for ten years; that they were connected with the Liberty Life and Casualty Company from October 10, 1920 to July 1931; that Gabney left Chicago December 21, 1930 for Kansas City and returned about January 5th or 6th, 1931, and then went back to Kansas City in the latter part of May 1931.

Pearl Gabney, the wife of Fred W. Gabney, with whom complainant charged his wife with adulterous acts, testified that she knew Mrs. Hatley for 15 years; that she knew the reputation of Mrs. Hatley in Kansas City among neighbors and friends, and that her reputation was good.

Laura E. Smith testified that she knew Mrs. Hatley in Kansas City, and that her reputation in the community and among her friends there for chastity was good.

Daisy McKnight testified that she knew the defendant; that she had lived in Kansas City prior to her moving to Chicago, and had known Mrs. Hatley for 14 years; that she was a friend of Viola Robinson, Mrs. Hatley's daughter, knew about Mrs. Hatley's marriage to Hatley; that she knew Mrs. Hatley's reputation in Kansas City among friends and neighbors, and that it was good.

business had given her no money since their separation
in August, 1934.

Defendant's counsel testified reporting in the
case her mother's testimony.

One William King, in the real estate business in
Chicago, testified that he had known Kelley for 30 years
and the defendant for ten years; that they were connected
with the Liberty Life and Casualty Company from October 10,
1930 to July 1931; that Kelley left Chicago December 31, 1930
for Kansas City and returned about January 25 or 26, 1931,
and then went back to Kansas City in the latter part of
1931.

Paul Kelley, the wife of Fred H. Kelley, with
whom defendant charged his wife with adultery, testified
that she knew Mrs. Kelley for 15 years; that she
knew the reputation of Mrs. Kelley in Kansas City as
not good and that her reputation was good,
and many her friends there for charity was good.

Paul Kelley testified that she knew the defendant
and that she had lived in Kansas City prior to her moving
to Chicago, and had known Mrs. Kelley for 14 years; that she
was a friend of John Kelley, Mrs. Kelley's daughter, knew
about Mrs. Kelley's services to charity; that she knew Mrs.
Kelley's reputation in Kansas City was good and that it was good.

One H. L. Foster testified for defendant that he lived in Kansas City and knew the parties; that he had worked for the Santa Fe line; that in 1930 he had occasion to go to Hatley's home; that he went out to Sales avenue to spade a garden for Hatley.

The foregoing is all the pertinent evidence which the court heard, and we quite agree with the chancellor that putting the most liberal construction which the evidence will bear in favor of complainant utterly fails to sustain a charge of adultery against his wife. Proffitt, complainant's only witness, never testified to any improper conduct between Dabney and Mrs. Hatley; this witness was not very reliable in his testimony for he admitted that he "had been bumming around the country." The chancellor saw the witnesses and observed their conduct and appearance, and therefore was in a much better position than we are to judge of the credibility and the force and effect of their testimony.

There is nothing in this evidence to show that there was any familiarity between the defendant and Dabney. The nearest the evidence approaches to any sign of familiarity is that when Dabney met defendant in Kansas City he smiled at her in the presence of complainant. From this smile no inference of adultery can be inferred. Defendant testified that Dabney was never in their Kansas City home, and that he never did any work there, but that one Foster, as above recited, did.

There is nothing in the record before us for review which would warrant this court in disturbing the conclusions at which the chancellor arrived. The decree of the Circuit Court dismissing complainant's bill for want of equity is affirmed.

TAYLOR, P. J. AND WILSON, J. CONCUR.

AFFIRMED.

... that he had worked in Kansas City and knew the parties; that he had worked for the Santa Fe line; that in 1939 he had occasion to go to Hattie's home; that he went out to Hattie's house to spend a garden for Hattie.

The foregoing is all the pertinent evidence which the court heard, and we agree with the chancellor that putting the most liberal construction which the evidence will bear in favor of complainant, it fails to contain a charge of adultery against his wife. Further, complainant's only witness, never testified to any improper conduct between Gabney and Mrs. Bailey; this witness was not very reliable in his testimony for he admitted that he had been drinking around the country. The chancellor saw the witnesses and observed their conduct and appearance, and therefore was in a much better position than we are to judge of the credibility and the force and effect of their testimony.

There is nothing in this evidence to show that there was any familiarity between the defendant and Gabney. The record shows no evidence to any sign of familiarity between the defendant and Gabney. It is true that Gabney was present in Kansas City on the date of the hearing of the complaint. From this date on in the presence of complainant. From this date on in the presence of complainant. Defendant testified that Gabney was never in their Kansas City home, and that he never did any work there, but that one Gabney, as above stated, did.

There is nothing in the record before us for review which would warrant this court in disturbing the chancellor's decision. The decree of the circuit court is affirmed.

412 - 32353

RALPH LEVIN,

Appellee,

v.

I. HANDBACH,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE HOLDEN delivered the opinion of the court.

Plaintiff in failing to follow this appeal renders no aid to the court in solving the questions presented for our decision by the record.

The plaintiff agreed to purchase from defendant a bill of goods, consisting of store fixtures, at the agreed price of \$225, and plaintiff deposited on account thereof the sum of \$300. Whatever the contract was regarding such fixtures rested in parole. Defendant delivered some fixtures to plaintiff's store, No. 1 South Jefferson street, Chicago, which upon examination plaintiff rejected as not being suitable for his store, and returned all of them to defendant. In the meantime plaintiff had executed and delivered to defendant a chattel mortgage conveying the fixtures to defendant to secure the balance of the purchase money \$225.

Defendant admits the sale of the fixtures for \$225 and the deposit of \$300, and the rejection thereof by plaintiff for the reason that they were not suitable for his purpose. There is no denial of the fact of the return to defendant by plaintiff of the fixtures. Defendant denies that any demand

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112 - 33333

ALLEN LEVY

Application

WILLIAM E. DUNN

OF CHICAGO

J. HANSEN

Applicant

Opinion filed May 2, 1939.

112 - 33333

Plaintiff in failing to follow this general rule

no aid to the court in solving the question presented for our decision by the record.

The plaintiff agreed to purchase from defendant a

bill of goods, consisting of seven fixtures, at the agreed

price of \$2500, and plaintiff deposited an account thereof

the sum of \$2500. Whether the contract was being made with

fixtures needed in parcel. Defendant delivered seven fixtures

to plaintiff's store, No. 1 South LaSalle Street, Chicago,

which upon examination plaintiff rejected as not being suitable

for its store, and returned all of them to defendant, as the

defendant (plaintiff) had returned and plaintiff had returned

a written notice, stating the fixtures to defendant, as the

the fixtures of the fixtures were returned.

Defendant claims to the sale of the fixtures for \$2500

and the deposit of \$2500, and the rejection thereof by plaintiff

for the reason that they were not suitable for his business.

There is no denial of the fact of the return to defendant by

plaintiff of the fixtures, defendant claims that any damage

was made for the return of the deposit or that the order was at any time cancelled. If a demand for the deposit was necessary, the commencement of the suit was a sufficient demand.

Defendant makes no claim that in any event the \$300 deposit was to be forfeited as damages for a breach by plaintiff of the contract for fixtures; neither did defendant claim from plaintiff by way of set-off or otherwise any sum as damages for the failure of plaintiff to retain the store fixtures delivered by defendant to him. Defendant had his fixtures returned to him and also had in his hands the \$300 deposited with him by plaintiff at the time of making the sale.

No defense of forfeiture of the deposit was made and no counter claim made by defendant for damages for breach of the contract by plaintiff. In this condition of the record the trial judge had no alternative than to enter a finding and a judgment for the amount of the deposit, which he did. There was no agreement for a forfeiture of the deposit under any circumstances and without such an agreement the deposit could not be lawfully withheld from plaintiff. Forfeitures are not favored in law and will not be recognized in the absence of a contract providing for a forfeiture. Forfeitures are often the means of oppression and injustice. Hence, the courts are prompt to seize upon any circumstances that indicate an election to waive a forfeiture. Where compensation can be made, the law in many cases and equity in all cases, discharges the forfeiture upon such compensation being made. Knickerbocker Life Ins. Co. v. Norton, 98 U.S. 334. Equity never lends its aid to enforce a forfeiture or penalty. Marshall v. Vicksburg, 15 Wall. 146. A clause of forfeiture created by law is construed differently from a similar clause

was made for the return of the deposit at that the order was
not any time cancelled. If a demand for the deposit was made
thereby, the announcement of the suit was a sufficient demand.

Defendant makes no claim that in any event the
\$500 deposit was to be forfeited as damages for a breach of
plaintiff of the contract for insurance; neither did defendant
claim from plaintiff by way of set-off or otherwise any sum
as damages for the failure of plaintiff to return the money
lives delivered by defendant to him. Defendant had his
lives returned to him and also had in his hands the \$500
deposited with him by plaintiff at the time of making the note.

No defense of forfeiture of the deposit was made
and no counter claim was by defendant for damages for breach
of the contract by plaintiff. In this condition of the record
the trial judge had no alternative than to enter a finding
and a judgment for the amount of the deposit, which he did.
There was no agreement for a forfeiture of the deposit when
any circumstances and without such an agreement the deposit
could not be forfeited without from plaintiff. Forfeiture
are not favored in law and will not be recognized in the
sense of a contract providing for a forfeiture. Forfeiture
are often the means of oppression and injustice. Hence,
the courts are prompt to refuse upon any circumstances that justify
an an election to waive a forfeiture. Where compensation can
be made, the law is very exact and equity in all cases, dis-
charges the forfeiture upon such compensation being made.
First Coast Life Ins. Co. v. Fortson, 22 L.R. 303. Equity
never looks the aid to enforce a forfeiture or penalty.
Windsor v. Richmond, 13 Woll. 148. A clause of forfeiture
inserted by law is construed differently from a similar clause

in an agreement between individuals. A legislature always imposes a forfeiture as a punishment inflicted for a violation of some duty enjoined by law; whereas individuals can only make it a matter of contract. Maryland for use, etc. v. B. & O. Rd. Co., 3 How. 534.

So in the case at bar there is nothing in the law or any contract between the parties which would justify a forfeiture of the \$300 deposit. Defendant has shown no lawful reason why he should retain it.

There is no error in the record before us for review and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

It is the fact that there is nothing in the law
or any contract between the parties which would justify a
forfeiture of the \$200 deposit. Defendant has shown no
breach of the contract and should retain it.

PYRAMID CHEMICAL COMPANY,
a corporation,
Appellee,

v.

RALPH SOLLITT & SONS CONSTRUCTION COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE HOLLOW delivered the opinion of
the court.

This action was brought to recover the sum of \$350 claimed to be due from defendant as a general contractor for Beth Israel Temple, Chicago, for services rendered in waterproofing parts of the concrete basement of said Temple. On July 3, 1925, defendant wrote plaintiff confirming a telephone conversation to proceed with the waterproofing and to make it an absolute watertight job, and guaranteeing the same for the sum of \$350. In this letter it was stated that payment would be made upon receipt of their O.K. by the architects, Halperin & Braun, "sometime next spring"; reciting "we will issue order on the architects to issue a certificate on the owner for payment;" requesting a letter of acceptance to the terms. Plaintiff refused to accept the terms stated in that letter and on the 15th of July, 1925 wrote defendant as follows:

"We have your letter of July 3rd, relative to the waterproofing of the basement of the Beth Israel Congregation.

We are prepared as in our proposition of July 19th, 1924, to treat the entire 'poured wall' and guarantee satisfaction for \$350. As to the method of payment, we are willing to wait until next spring, but in no

[illegible]

case later than April 1st.

Trusting that this covers the matter and that we shall proceed as per your telephone instructions of today."

The contract for this waterproofing was with defendant as the general contractor of the owner. In its affidavit of merits defendant claims that the work was done in pursuance of the letter of July 3, 1935, and that plaintiff did not make the walls watertight, and that defendant was not obliged to pay plaintiff any sum of money, but was obliged to issue an order on the architects named in the foregoing letter only, when it had received the final O.K. from the architects, which defendant did not receive; and denies that it is indebted to plaintiff in the sum of \$350 or any other sum.

The case was tried before the court without a jury, and there was a finding against defendant and in favor of plaintiff and damages assessed at the sum of \$350, upon which after overruling motions for a new trial and in arrest of judgment, the judgment appealed from was entered.

The questions here are mainly of fact. We are not permitted to disturb the finding of the trial judge unless we can say in effect that the evidence demonstrates the finding was contrary to its probative force. In a measure there is contradiction in the testimony of the several witnesses, although such testimony is readily solvable as supporting the trial judge's findings. The contention that the contract of the parties is that attempted to be made by defendant's letter to plaintiff of July 3, 1935, is clearly contrary to the fact. The contract was to be made by a letter

case later than April 1st.
Following this case, the court in the
case we shall discuss in this report in the
of today.

The contract for this waterpiping was with
defendant as the general contractor of the owner. In the
affidavit of service defendant claims that the work was done
in pursuance of the order of July 3, 1923, and that plain-
tiff did not make the well in waterpiping, and that defendant
was not obliged to pay plaintiff any sum of money, but was
obliged to issue an order on the architect named in the
foregoing letter only, when it had received the final bill
from the architect, which defendant did not receive; and
thence that it is indebted to plaintiff in the sum of \$1250
on any other sum.

The case was tried before the court without a jury.
and there was a finding against defendant and in favor of
plaintiff and damages assessed at the sum of \$1250, with which
other averring, motions for a new trial and in arrest of
judgment were overruled.

The court found the facts as set forth in the
permitted to disturb the finding of the trial judge unless
we can say in effect that the evidence demonstrated the
finding was contrary to its probative force. In a recent
there is contradiction in the testimony of the several witnesses
although such testimony is readily soluble on supporting
the trial judge's finding. The contention that the con-
tent of the motion is that attempted to be made by defendant
and a letter to plaintiff of July 3, 1923, is clearly con-
trary to the facts. The contention was to be made by a letter

from plaintiff accepting the same. This plaintiff declined to do, and wrote the letter of July 15, 1935, under which plaintiff proceeded to do the work without any objection or interference upon the part of defendant. The matter of the architects' approval therefore is not in the case, as a necessary requisite for payment. The architects in no way were injected into the case to supervise the work of plaintiff. The evidence of plaintiff abundantly supports its theory of the terms under which the work was done, and the trial judge might reasonably hold, as he did, that the evidence of defendant was not sufficient to overcome the case made by plaintiff's proofs. Plaintiff wrote to defendant five letters, in which it asked for payment of the account, which had therefore been rendered. These letters are dated March 1, 1936, April 16, 1936, July 23, 1936, October 23, 1936 and November 15, 1936, covering a period of more than eight months. Defendant did not reply to any of these letters. As from silence assent may be inferred, plaintiff might have from such silence inferred that defendant acquiesced in such demands for payment of the contract price made by each of these letters.

The opportunity of the trial judge of weighing the evidence and judging the credibility of the witnesses was such as are denied to this court. He saw the witnesses and was able from their appearance and their manner of testifying to judge of their apparent frankness and credibility, and in weighing the testimony we are persuaded that he reached a correct conclusion.

from Plaintiff's testimony. This Plaintiff's testimony is to be, and was the latter of July 18, 1936, under which Plaintiff requested to be the work without any objection or interference upon the part of Defendant. The matter of the Defendant's approval therefore is not in the case, as a necessary requisite for payment. The evidence in the case were introduced into the case to impeach the work of Plaintiff. The evidence of Plaintiff's testimony supports the theory of the facts under which the work was done and the trial judge might reasonably hold, as he did, that the evidence of Defendant was not sufficient to overcome the case made by Plaintiff's words. Plaintiff seeks to Defendant that letters, in which it asked for payment of the account, which had theretofore been rendered. These letters are dated March 1, 1936, April 16, 1936, July 22, 1936, October 23, 1936 and November 19, 1936, covering a period of more than eight months. Defendant did not reply to any of these letters and from silence cannot say he intended, Plaintiff might have from such silence inferred that defendant acquiesced in such demands for payment of the account prior made by each of these letters.

The opportunity of the trial judge of weighing the evidence and judging the credibility of the witnesses was such as are denied to this court. He saw the witnesses and was able from their appearance and their manner of testifying to judge of their apparent frankness and credibility, and in weighing the testimony we are prevented from so reaching a correct conclusion.

Defendant sought to interpose the defense of rescission and of a rescission of the contract. These are special defenses and should have been set up, in order to be availed of, by appropriate pleadings. This defendant failed to do. Therefore these defenses cannot be interposed in this court for the first time, and consequently they are not before us for review. As held in Rave v. Kuhn, 201 Ill. App. 100, a defense that is not raised in the trial court cannot be raised on appeal for the first time. As in this case, where a finding of the trial court is based upon conflicting evidence, it will not be disturbed on appeal as unsupported by the evidence, even though the evidence might support a finding to the contrary. Hooper v. Laskackia Live Stock Insurance Co., 201 *ibid.* 167. To a like effect is Auto Parts Co. v. Roberts, 194 *ibid.* 417.

Finding no reversible error in this record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, R.J. AND WILSON, J. CONCUR.

The court sought to interpret the balance of the evidence
and of a reading of the contract. These are questions
of fact and should have been left to the jury in order to be decided
by appropriate instructions. This defendant failed to do so.
Therefore these questions cannot be interpreted in this court.
The court found that the defendant's evidence was not sufficient
for review. As held in People v. Jones, 201 Ill. 100, 101.
Evidence that is not raised in the trial court cannot be
raised on appeal for the first time. As in this case, where
a finding of the trial court is based upon conflicting evi-
dence, it will not be disturbed on appeal as unsupported by
the evidence, even though the evidence in its support is thin.
The court found that the defendant's evidence was not sufficient
for review. As held in People v. Jones, 201 Ill. 100, 101.
Evidence that is not raised in the trial court cannot be
raised on appeal for the first time. As in this case, where

finding no reversible error in this regard, the judge
must of the material facts is sufficient.
The court found that the defendant's evidence was not sufficient
for review. As held in People v. Jones, 201 Ill. 100, 101.
Evidence that is not raised in the trial court cannot be
raised on appeal for the first time. As in this case, where

13 - 32426

ANNA E. TANNER,

Plaintiff in Error,

v.

JOHN C. TANNER,

Defendant in Error.)

ERROR TO

SUPERIOR COURT,

ONE COUNTY.

Opinion filed May 2, 1928.

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF
THE COURT.

This is a bill for separate maintenance filed by complainant against defendant, her husband, on March 23, 1915, in which complainant alleges that she is living separate and apart from her husband without her fault; that two children were born of the marriage, Theodore 9 years and Anna 8 years of age at the time of the filing of the bill. She avers that the last money she received from defendant before the filing of her bill was December 23, 1914; that defendant neglects his trade as a barber and spends his money gambling and betting on horses; that when working he can earn from \$14 to \$20 a week; that he is a beneficiary under the will of his mother under which the Northern Trust Company Bank of Chicago is the trustee, and that therefrom he has an income of \$50 a month; that during the separation complainant lived with her parents at Princeton, Wisconsin.

An amended bill of complaint was also filed. Defendant answered the amended bill denying that his wife was living separate and apart from him without her fault;

WILLIAM E. TAYLOR,

Plaintiff in Error,

VERSUS

THE STATE OF ILLINOIS,
Defendant in Error.

Noted in error.

Opinion filed May 8, 1938.

THE STATE OF ILLINOIS, Plaintiff in Error,

VERSUS

WILLIAM E. TAYLOR, Defendant in Error.

On appeal from the judgment of the Circuit Court of Cook County, Illinois, entered on March 22, 1937.

In which complaint alleges that the living separate

and apart from the defendant, William E. Taylor, and

children were born of the marriage, between 1912 and

8 years of age at the time of the filing of the bill.

avers that the last money she received from defendant before

the filing of her bill was November 22, 1935; that defendant

has neglected his trade as a barber and spends his money

gambling and betting on horses; that when working he can

earn from \$14 to \$20 a week; that he is a dissolute and

the will of his mother under which the northern trust company of

Chicago is the trustee, and that therefore he has no income

of \$20 a month; that during the separation complaint lived

with her parents at Princeton, Wisconsin.

An amended bill of complaint was also filed.

Defendant answered the amended bill denying that his wife

was living separate and apart from him without necessity;

denies that he was able to earn \$14 to \$20 a week, and avers that his only income is \$50 a month which he receives from his mother's estate.

On a trial before the chancellor there was a finding for defendant and a dismissal of the bill for want of equity, and complainant brings the record here for our review.

The testimony shows that on April 6, 1913, defendant deserted his wife and two children in a flat in Chicago, the rent of which was \$18 per month; that he told her to go and live with her folks in Wisconsin; that she might just as well go sooner or later, because she would have to go some day; that she went and took her children; that defendant put the furniture in storage and sold some of it and kept the purchase money. In 1914 plaintiff met defendant in Chicago; he wanted to know if she would come back and live with him; she said she would if he would furnish her with a home; he met complainant at her brother's house and wanted to know how much money she had saved, and when she told him that she had nothing, she testified, he took a razor out of his pocket and threatened her with it; he told complainant if she had money to pay the rent and move the furniture back they would go to housekeeping. Complainant remained in Chicago three or four days and then returned to Princeton, Wisconsin. Defendant never offered to make a home for complainant but was willing to have her make a home for him with her own money on the assumption by him that she had money; that complainant worked and earned money to support her family during the separation. It is in evidence that defendant received from 1918 to 1923 in excess of \$300 a month from the government.

...that he was able to earn \$10 a week, and every
that his only income in 1900 a month which he received from
his mother's estate.

On a trial before the Chancellor there was a finding
in favor of defendant and a dismissal of the bill for want of
equity, and complaint brings the record here for our review.

The testimony shows that on April 6, 1900, defendant
and deceased his wife and two children in a flat in Chicago,
the rent of which was \$15 per month; that he told her to go
and live with her father in Wisconsin; that she might have
as well go home or leave, because she would have to go home
anyway; that she went and took her children; that defendant paid
the furniture a store and sold some of it and kept the rest
money; in 1901 plaintiff met defendant in Chicago; he wanted
to know if she would come back and live with him; she said
she would if he would furnish her with a home; he was not
placated at her brother's house and wanted to know how much
money she had saved, and when she told him that she had nothing,
she testified, he took a paper out of his pocket and threatened
her with it; he told complaint that she had money to pay the
rent and move the furniture back; they would go to housekeeping.
Complaint remained in Chicago three or four days and then
returned to Princeton, Wisconsin; defendant never offered to
make a home for complaint but was willing to have her come
a home for him with her own money on the assumption by him
that she had money; that complaint worked and earned money
to support her family during the negotiation. It is in evidence
that defendant received from 1918 to 1925 an income of \$500 a
month from the government.

We think that the evidence abundantly proves that complainant was living separate and apart from her husband without her fault; that defendant failed in his duty to supply his wife with a home with reasonable support for herself and their children while they were minors.

The evidence further proves that defendant deserted his family and permitted his wife to bring up their two children until they arrived at maturity with but little assistance from him, and that he never made a bona fide effort to support the complainant as the evidence shows he was financially able to do.

While the record is certified as complete by the clerk of the Superior Court, yet it bears integral evidence to the contrary. The following is not abstracted, but in searching the record we find on page 38 thereof a notice from the solicitor for defendant to the solicitor for complainant, dated December 21, 1926, the receipt of which is acknowledged by solicitor for complainant, to the effect, that counsel for defendant would appear before Judge Joseph Sabath, and ask the court "to modify the order for alimony heretofore entered on May 4, 1915, in support of which motion I shall offer the attached petition." The record fails to show any order for alimony either on May 4, 1915, or at any other date. In said petition (page 39 of the record) defendant "states that said cause came up for hearing on May 4th, 1915, on motion of complainant for temporary alimony and solicitor's fees; that in order to provide for his two children, Theodore, then aged 9, and Emma, then aged 8, defendant agreed to pay ninety (\$90) Dollars quarterly for

no claim that the evidence substantially proves that complainant was living separately and apart from her husband without her fault; that defendant failed in his duty to supply his wife with a home with reasonable comfort for her self and their children while they were married.

The evidence further proves that defendant deserted his family and permitted his wife to bring up their two children until they arrived at majority with but little assistance from him, and that he never made a bona fide effort to support the people whom as the evidence shows he was financially able to do.

While the record is certified as complete by the clerk of the Superior Court, yet it bears integral evidence to the contrary. The following is not abstracted, but is taken from the record as found on page 36 thereof a notice from the collector for defendant in the collection for complainant, dated December 21, 1922, the receipt of which is acknowledged by collector for complainant, to the effect that defendant was not present before Judge Joseph G. Smith, and that the court "so modify the order for alimony heretofore entered on May 11, 1915, in support of which motion I shall offer the attached written". The record fails to show any order for alimony either on May 11, 1915, or at any other date. It said position (page 36 of the record) defendant "states that said court came up for hearing on May 11, 1915, on motion of complainant for temporary alimony and collector's fees; that in order to provide for his two children, Theodore, then aged 5, and James, then aged 3, defendant agreed to pay weekly (\$50) for late quarterly for

the support of his children; that petitioner's only intent and agreement was to pay said money for the support of said children; that an order was entered accordingly, but the same, without defendant's knowledge, was made to read 'as alimony for the support of herself and said children'; that the order also provided for several other matters, all of which had been complied with ever since said date until the present date by petitioner."

It therefore does appear from defendant's own sworn petition that an order for the payment of \$90 every three months, as temporary alimony, was allowed by the court on May 4th, 1915, which order was complied with by defendant's payment of \$90 quarterly until the giving of the notice and the filing of the petition on December 31, 1926, a period of nearly eleven years. The record does not show any action taken upon that petition. Therefore defendant at least acquiesced in the justice of the order for temporary alimony by paying the same for nearly eleven years. The record further shows that the cause was stricken from the docket on June 28, 1918, and reinstated and redocketed by agreement of the parties on the 24th day of January, 1927. This part of the record is proper to be taken into consideration in determining the conduct and action of the parties.

A careful study of all the evidence in the case convinces this court that complainant sustained the averments of her amended bill by adequate proof, and that the action of the chancellor in denying complainant separate maintenance and dismissing the bill for want of equity was contrary to the clear, probative force of the evidence. There is no attack

the support of his children; that petitioner's only intent and agreement was to pay said money for the support of said children; that an order was entered accordingly, but the same, without defendant's knowledge, was made to read "an alimony for the support of herself and said children"; that the order also provided for several other matters, all of which had been complied with ever since said date until the present date by defendant.

It therefore does appear from defendant's own sworn petition that an order for the payment of \$200 every three months, as temporary alimony, was entered by the court on May 4th, 1916, which order was complied with by defendant's payment of \$200 quarterly until the giving of the notice and the filing of the petition on December 21, 1925, a period of nearly eleven years. The record does not show any action taken upon that petition. Therefore defendant at least acknowledged in the justice of the order for temporary alimony by paying the same for nearly eleven years. The record further shows that the same was assigned from the docket on June 22, 1916, and reinstated and reentered by agreement of the parties on the 24th day of January, 1927. This part of the record is proper to be taken into consideration in determining the conduct and action of the parties.

A careful study of all the evidence in the case convinces this court that defendant intended the agreement of her amended bill by separate grant, and that the action of the chancellor in denying defendant's motion to set aside and annulling the bill for want of equity was contrary to the clear, positive force of the evidence. There is no attack

made upon the credibility of complainant and her testimony supported as it is by the conditions environing the parties, creates a clear preponderance of proof in her favor. While we do not ordinarily disturb the findings of the chancellor upon the facts, yet it is incumbent upon us to do so where such findings, as in the instance case, are so glaringly inconsistent with the probative force of the proofs.

The decree dismissing the complainant's bill for want of equity is therefore reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree granting to complainant separate maintenance, as prayed in her amended bill, and the court is also directed to take testimony regarding the present ability of defendant to pay to his wife support money, and to enter an order for such support money as the court may conclude from the proofs offered that the defendant is reasonably able to pay and the complainant is entitled to receive.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

TAYLOR, P.J. AND WILSON, J. CONCUR.

made upon the credibility of complainant and her testimony supported as it is by the conditions existing at the time, while creates a clear presumption of fraud in her favor. While as do not ordinarily disturb the findings of the chancellor upon the facts, yet it is incumbent upon us to do so where such findings, as in the instant case, are so glaringly inconsistent with the probative force of the facts.

The decree dissolving the complainant's bill for want of equity is therefore reversed and the cause is remanded to the Circuit Court with directions to that court to enter a decree granting to complainant separate maintenance, as prayed in her amended bill, and the court is also directed to set aside, annulling the present ability of defendant to pay to his wife support money, and to enter an order for said support money as the court may conclude from the facts offered that the defendant is reasonably able to pay and the complainant is entitled to receive.

REVEREND JUSTICE AND COUNSEL WITH FRIENDS

WATSON, J. L. AND HENRY J. CONNER.

CARLSON FUEL & SUPPLY CO.,
a corporation,

Appellee,

v.

JAMES L. MUNGER and JAMES T.
MUNGER,

Appellants.)

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed May 2, 1928.

MR. JUSTICE HOLCOM delivered the opinion of
the court.

This case is here for the second time. The opinion
filed is reported in abstract form in 343 Ill. App. 628. We
refer to the opinion on file in Gen. No. 31,039 for a sufficient
statement of the facts and law of the case to the time of the
handing down of the foregoing opinion. The original judgment
in the case was by confession, entered January 5, 1925, for
\$1262, which judgment was reversed by this court in case supra,
and a new trial resulted in a verdict in favor of plaintiff and
a restoring in the record of the trial court of that judgment,
from which defendants bring the record to this court seeking
a reversal.

As will be observed from a perusal of the fore-
going opinion the question to be solved by the jury was whether
the note in suit and in evidence was the note of the defendants
or of a corporation "J. L. Munger & Bros. Inc." It is unnecessary
to state the form of the note here, as it is fully described in
the foregoing opinion. The first trial was before the judge

APPEAL FROM
SUNSHINE COUNTY
COURT
DOCK NO. 17

APPEAL
JAMES L. HARRIS and others
Plaintiffs
vs.
SUNSHINE COUNTY
Defendants
(Appellants)

Opinion filed May 5, 1938.

MR. JUSTICE HOLMES delivered the opinion of
the court.

This case is here for the second time. The opinion
filed is reported in abstract form in 345 Ill. App. 622. It
relates to the opinion on this in case No. 31,522 for a writ of
certiorari of the facts and law of the case at the time of the
hearing down of the foregoing opinion. The original judgment
in the case was by certiorari, entered January 5, 1935, for
\$1500, which judgment was reversed by this court in case No. 31,522,
and a new trial resulted in a verdict in favor of plaintiff and
a restoration in the record of the trial court of that judgment.
Then which defendant during the record to this court seeking
a writ of certiorari.

As will be observed from a perusal of the fore-
going opinion the question to be solved by the jury was whether
the note in suit and in evidence was the note of the defendant
or of a corporation "J. L. Hargis & Sons, Inc." It is unnecessary
to state the form of the note here, as it is fully described in
the foregoing opinion. The first trial was before the judge

without a jury and the second trial was before the court with a jury. The questions of fact submitted to the jury were whether the note was that of defendants or the corporation.

The jury heard the testimony of witnesses on both sides as to whether the note was defendants' or that of the corporation. They also had the note before them which this court held in case, supra, was ambiguous as to its execution. As appears from the former opinion and the note itself, which is before us, there is a blue ink rubber stamp, which reads: "J. L. Munger & Bros. Inc." with a line in the same color ink, on the end of which is "Pres-Treas." No name is signed on that line, and below the line appear the names signed in ink "James L. Munger, James T. Munger", the defendants herein.

There was evidence from which the jury might find that the date of the note is anterior to the incorporation of Munger & Bros. Inc., and there is no denial in the evidence, but that the corporation was not in existence at and for some time prior to the last trial of the case. The names of the defendants on the end of the note are signed in the usual way in which notes of that character are signed. There is nothing to indicate that they had any connection whatsoever with the blue stamp of the corporation, and we are of the opinion ourselves that the signatures to the note were those of defendants. We say this from an examination of the original note in evidence which has been certified to us under order of the Superior Court, by the clerk thereof, and as said in Williams v. Miami Power Co., 38 Ill. App. 107:

without a jury and the second trial was before the court with

a jury. The question of fact submitted to the jury was whether the note was that of defendant or the corporation.

The jury heard the testimony of witnesses on both

sides as to whether the note was defendant's or that of the

corporation. They also had the note before them which was

presented in evidence, and the jury heard the testimony of

as appears from the former opinion and the note itself, which

is before us, there is a line in the upper margin, which reads:

"J. L. Hunter & Bros. Inc." with a line in the same color ink

on the end of which is "Transferred". No name is signed on that

line, and below the line appear the names signed in ink "James L.

Hunter, James L. Hunter", the defendant herein.

There was evidence from which the jury might find

that the date of the note is anterior to the incorporation of

Hunter & Bros. Inc., and there is no doubt in the evidence

that the corporation was not in existence at and for some

time prior to the last trial of the case. The names of the

defendants on the end of the note are signed in the name

in which notes of that character are signed. There is

nothing in evidence that they had any connection whatever

with the line stamp of the corporation, and we are of the

opinion ourselves that the signatures to the note were those of

defendants. We say this from an examination of the original

note in evidence which has been certified to us under order

of the superior court, by the clerk thereof, and we said in

James L. Hunter & Bros. Inc. vs. J. L. Hunter & Bros. Inc.

"There is nothing to show the parties are officers of the corporation to make it the note of the corporation only, nor is there any evidence to show it was the corporation debt. In the absence of such evidence, they are personally liable."

The court instructed the jury at the request of the plaintiff that:

"The jury is further instructed that where a party signs his name to a note without designating after his signature sufficient identity to show he signed as an officer of a corporation, then such party so signing cannot escape his liability on the note by claiming he signed such note as an officer of a corporation."

This was a proper instruction and submitted to the jury the real question for their determination.

Among other instructions at the request of defendant the court gave the following:

"The jury are instructed that if after taking into consideration all the evidence and the facts and circumstances appearing in evidence in this case, and all the reasonable inferences to be deduced therefrom you believe from the evidence that the defendants, James L. Munger and James T. Munger signed the note of the plaintiff for and on behalf of the corporation, J. L. Munger & Bros. Inc., and not in their individual capacity, then you should find the issues for the defendants."

These instructions presented to the jury the view of both sides of the question at issue. While other instructions were offered and given, they were not material to the point we are now discussing. There are some instructions proffered by defendant which the court refused, which would not have been harmful, if given, but they were unnecessary as the jury were fully instructed on the theories of both plaintiff and defendants as to the execution of the note in evidence.

There is no other person known to me who was connected with the company at the time it was organized.

The court instructed the jury as the record in
the plaintiff's case:

It is a fact that the Government has been unable to obtain any information from the Government of the United States regarding the activities of the Government of the United States in the United States. The Government of the United States has been unable to obtain any information from the Government of the United States regarding the activities of the Government of the United States in the United States.

to the fact that the new machine is not yet in the hands of the public, and that the new machine is not yet in the hands of the public, and that the new machine is not yet in the hands of the public.

and enclosed the cover the following:

1. The purpose of this document is to provide information regarding the activities of the [redacted] and the [redacted] in the [redacted] area. The information is being provided to you for your information and is not to be used for any other purpose.

and documents on the execution of the role in evidence, they were fully instructed on the location of each exhibit have been made. It should not be more necessary to be forced by documents which the court retained, which would not point to any new discovery. There are some evidentiary points along with altered and given, they were not material to the of both sides of the execution of those. While other law firms These documents presented to the jury the view

so that the refusal of such instructions had no effect whatever adverse to defendants' claimed defenses.

The form of the order restoring the original judgment is the proper order to be entered in the case. The court held substantially in King v. Heilig, 303 Ill. App. 117, that the form of judgment in such case should be to confirm the judgment taken on confession; and Cervenka v. Hunter, 185 Ibid. 547 that the judgment should direct that the previous judgment continue in full force and effect and the entry of a separate and independent judgment is erroneous.

There is no procedural error apparent in the record or of law in the giving or refusal of instructions. Therefore the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, F.J. AND WILSON, J. CONCUR.

so that the nature of such an error is not always obvious
because the defendant's statement is not always correct.

The form of the order restoring the original judgment
must be the proper order to be entered in the case. The court
held substantially in King v. Smith, 202 Ill. App. 119, that
the form of judgment in such cases should be as follows: The judge
will give no judgment on the merits of the case, but the parties
shall be allowed to file a new judgment, and the parties shall
continue in full force and effect, and the entry of a separate
and independent judgment is unnecessary.

There is no procedural error in the order
of law in the giving of notice of fact that the
form the judgment of the Superior Court is affirmed.

APPROVED:

WILLIAM H. HARRIS, JUDGE

LOUIS CRANE,

Plaintiff in Error,

v.

DAVID ZOLOTOV and ISRAEL
CHOLDENKO,

Defendant in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE HOLMES delivered the opinion of
the court.

This is an action upon a promissory note made by
defendants for the sum of \$500, dated March 15, 1926, and
due six months after date with interest at 7% after maturity.
There was a warrant of attorney attached to the note to con-
fess judgment thereon. On the back of the note is the
following:

"December 16, 1926.

This is to certify that Louis Crane, the
legal holder and owner of this note, has received
from Dave Zolotov \$250.00 and interest to date, and
that his share is fully satisfied, and that I hereby
release and discharge the said David Zolotov from any
and all obligations by virtue of this note.

Louis Crane (Real)"

On February 23, 1927, judgment by confession upon
the note was entered for the balance due thereon against both
defendants for \$287.20, which included \$30 attorney's fees,
assessed in pursuance of the condition in the warrant of
attorney regarding attorney's fees. One of the defendants,
Israel Choldenko, moved to open the judgment, but his co-
defendant, David Zolotov, did not join in the motion. On

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On February 22, 1947, judgment of conviction upon the plea was entered for the balance due against the defendant for \$287.50, which included the attorney's fees assessed in payment of the condition in the warrant of arrest. The defendant's attorney's fees of the defendant's attorney's fees, but his own.

the showing made by the affidavit and petition of Choldenko the judgment was opened but remained as security, and defendants were let in to make their defense. The hearing was before the court, and on June 23, 1937, the trial judge on such hearing vacated the judgment and entered a judgment of nil capiat and for costs against plaintiff, and plaintiff has sued out this writ of error seeking our review.

The action of the trial court was evidently controlled somewhat by the endorsement on the back of the note. Neither of the defendants put in any defense upon the trial. Plaintiff was sworn as a witness and testified in regard to the consideration for the note, and also testified that the defendant, Israel Choldenko, frequently promised to pay the balance due on the note. Such testimony is not contradicted. The court's conclusions were reached upon the assumption that the receipt by plaintiff of \$250 from defendant David Zolotov released the defendant, Israel Choldenko, from all obligation as a maker of the note.

The payment by one of the defendants of \$250 to the plaintiff on account of the amount due upon the note did not operate to release either of them from performing the contract created by the execution of the note in suit. We think this case is governed both on fact and principle by Davidson v. Burke, 143 Ill. 139, in which the court said:

"When William Norvell paid one-half of the amount due on the note; and the suit then pending against him was dismissed, it was expressly stated by the executors that they could not and would not release him from the note. * * *
* * * William Norvell, it is true, paid one-half of the amount due as principal and interest on the note; but that he was already legally bound to do by his contract, and he was also equally bound to pay the other moiety also, so that there was

no consideration for the promise to probate."

It follows that the agreement endorsed upon the back of the note was without consideration and not binding on any of the parties, either the payee or the makers of the note.

It therefore follows that the court erred in its finding and entering of a judgment of nil capiat and in vacating the judgment by confession. For that error the judgment of the Municipal Court of nil capiat, entered June 22, 1927, is reversed and the cause is remanded with directions to expunge that judgment from the record and to reinstate the judgment by confession of \$287.30 which was entered on February 23, 1927.

JUDGMENT REVERSED AND CAUSE REMANDED WITH
DIRECTIONS.

TAYLOR, F. J. AND WILSON, J. CONCUR.

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THE PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,)

v.)

THOMAS MALONEY,)

Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE HOLDEN delivered the opinion of the court.

On a trial before the trial judge without a jury defendant was found guilty as charged in the information and sentenced to imprisonment for four months in the House of Correction, together with a fine of \$100 and costs of the proceeding.

The motion for a new trial was overruled, and the motion to vacate the judgment was likewise overruled. Defendant made a motion for a new trial on the ground of newly discovered evidence, and in an attempt to sustain his motion filed three affidavits, one his own, one of Police Officer Oscar A. Giese, and the third of Michael Ferriter.

The affidavit of Maloney was to the effect that he resided at 6312 North Francisco avenue and had been a resident of Illinois for three years; that he was a carpenter contractor by trade and that he had never been arrested before; that since the trial on October 11, 1927 he had caused an investigation to be made and discovered facts, circumstances

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1938

THE PEOPLE OF THE STATE OF ILLINOIS

Defendant in Error

vs.

WILLIAM J. COOK

CHIEF OF POLICE

at 100 N. 1st St.

CHICAGO, ILLINOIS

Defendant in Error

Opinion filed May 2, 1938

Defendant in Error, after an appeal from the judgment and

verdict to the Supreme Court of Illinois, has been

reversed and the case remanded to the Court of Appeals

for further proceedings. The judgment of the Court of Appeals

is affirmed. The judgment of the Court of Appeals is

reversed and the case remanded to the Court of Appeals

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is affirmed. The judgment of the Court of Appeals is

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and evidence not known before; but what such evidence was, if any, or why it had not been discovered in time to be presented at the trial does not appear.

Officer Giese swore that he made an examination of the office of T. J. Grady, 2800 Devon Avenue, at 12 o'clock noon September 28, 1927, and found a few blood spots on a table, but no pools of blood in the office. And Michael Ferriter swore that on September 27, 1927, at 9 o'clock P.M. he passed Grady's office and saw blood on the sidewalk in front of the premises, and also on the railing in front of the premises, and that the office was closed.

This presents but one question for our determination, - it is, - did the trial judge commit error in refusing to allow the motion to reinstate the case on the ground of newly discovered evidence? It is so patent from the foregoing three affidavits that the defendant utterly failed to show thereby that he had made any effort to procure the alleged newly discovered evidence or that he was not just as well able to produce it on the trial. We could not from the record before us find that the trial judge abused the discretion which the law vests in him in denying defendant's motion to reinstate the case for alleged newly discovered evidence for the potent reason that such newly discovered evidence is not made to appear by the record, and what such newly discovered evidence might be, none of the three affidavits recites or sets forth.

The People also contend that there is no motion for

...of the trial does not appear.

Officer Glass swore that he made an examination

at the office of T. J. Brady, 2800 Madison Avenue, at 12 o'clock

noon September 22, 1927, and found a few blood spots on a

table, but no pools of blood in the office. And Michael

Forrest swore that at 27, 1927, 2 o'clock

W. M. McQuinn's office and saw blood on the sidewalk

in front of the apartment, and also on the railing in front

of the apartment, and that the office was closed.

This is presented but one question for our determination

now - Is it - did the trial judge commit error in refusing

to admit the motion to rehear the case on the ground of

newly discovered evidence? It is no part of the law

going three alternatives that the defendant attorney failed to

show clearly that he had made any effort to procure the

alleged newly discovered evidence at that he was not just

as well able to procure it on the trial. He could not from

the record before us find that the trial judge should be

reversed with the law as it was in denying defendant's

motion to rehear the case for alleged newly discovered

evidence for the patent reason that such newly discovered

evidence is not such as to make up the record, and that such

newly discovered evidence might be, none of the three alternatives

reversed on each point.

Heck also contends that there is no motion for

a new trial in the bill of exceptions. An examination of the bill of exceptions found in the record bears out this contention. There is no action for a new trial in the bill of exceptions.

The court said in People v. Frank Gabrys, 329 Ill. 101,

"Plaintiff in error complains of the denial of his motion for a new trial, but the bill of exceptions contains no evidence that a motion for a new trial was made. To permit a review of an order denying a motion for a new trial the bill of exceptions must show that such a motion was made and the order of the court denying the same. The only method by which these questions can be preserved is by a bill of exceptions (Call v. People, 201 Ill. 498; Harris v. People, 130 Id. 457.) In order to bring before this court for review the question of the sufficiency of the evidence to sustain the verdict it is necessary that the losing party make a motion for a new trial, and upon its being overruled except to such ruling, and to include such motion, the order overruling the same and exceptions thereto, together with the evidence, in a bill of exceptions. (Yarber v. Chicago & Alton Railway Co., 235 Ill. 589). No action for new trial, with the ruling thereon, having been preserved in the bill of exceptions, this court cannot review the sufficiency of the evidence."

Finding no reversible error in the record presented for our review, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P. J. AND WILSON, J. CONCUR.

A new bill in the bill of exceptions, in connection with
the bill of exceptions found in the record book and this
connection there is no action for a new trial in the
bill of exceptions.

The bill was passed by the House on March 1, 1908, and by the Senate on March 1, 1908. It was signed by President McKinley on March 1, 1908. The bill was passed by the House on March 1, 1908, and by the Senate on March 1, 1908. It was signed by President McKinley on March 1, 1908.

ROSE A. MCCAULEY,

Appellant,

v.

MICHAEL MCCAULEY,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The complainant, Rose A. McCauley, filed her bill of complaint in the Circuit Court of Cook County, charging that she was married to the defendant, Michael McCauley, on September 18, 1918, and continued to live with him until August 3, 1924; that one child was born of said marriage; that the defendant shortly after the marriage started in upon a course of cruel conduct toward the complainant and abandoned her and refused to furnish a home for herself and child; and asking for separate maintenance for herself and child and its custody. The defendant filed a cross-bill charging desertion on August 3, 1924; and asked for a divorce and the custody of the child. A decree was entered in the trial court after a hearing before the chancellor, finding that the complainant had been guilty of desertion; that it was for the best interests of the child that its custody be awarded to the father, and granting a decree of divorce to the defendant as prayed for in his cross-bill.

From the testimony it appears that on August 3, 1924, and again on August 4, the defendant upon his return

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MOORE A. HODGKINS,
Appellee,
v.
NICHOLAS HODGKINS,
Appellant.

Opinion filed May 2, 1938.

MR. JUSTICE GILSON delivered the opinion of the court.

the court.

The complaint, Moore A. Hodgkins, filed May 11, 1937, was captioned as follows:

Attestation is made that the following is a true and correct copy of the complaint filed by Moore A. Hodgkins, on May 11, 1937, in the District Court of the County of ... State of ...

That the said complaint was filed in the District Court of the County of ... State of ... on May 11, 1937, and that the same was duly filed for record in the office of the Clerk of said Court.

Witness my hand and the seal of said Court at ... this 11th day of May, 1937.

Attest: ...

By the Court: ...

And the court do hereby certify that the foregoing is a true and correct copy of the complaint filed by Moore A. Hodgkins, on May 11, 1937, in the District Court of the County of ... State of ...

Witness my hand and the seal of said Court at ... this 11th day of May, 1937.

Attest: ...

By the Court: ...

changing question on August 3, 1937, and asked for a divorce and the custody of the child. A decree was entered in the trial court after a hearing before the chancellor, finding that the complainant had been guilty of desertion, that it was for the best interests of the child that the custody be awarded to the father, and granting a decree of divorce so the defendant be freed for in his own right.

From the testimony it appears that on August 3, 1937, and again on August 11, the defendant upon his return

to his home found the door locked. About two weeks later he returned to the house with the child, accompanied by one Robert McCormick, and endeavored to gain admission, but it was refused by complainant. It is clear from the testimony that on or about that date there was a desertion of the defendant by the complainant. It is sought to overcome this by a claimed conversation between the complainant and the defendant, in the chambers of one of the judges of the Circuit Court, before whom it appears the cause was pending, in which the court attempted to reconcile the parties. The testimony of the witness to this conversation, called by the complainant, indicated that in his opinion she was inclined to go back to the defendant. Conversations under such circumstances do not necessarily represent the free and voluntary acts of the parties, and outside of this testimony, there does not appear to have been any bona fide voluntary offer on the part of the complainant to return to the marriage relationship with the defendant. It further appears that there had been a preliminary proceeding on the cause, at which the custody of the child had been awarded to the father, and he had had the child from practically the date of the separation. From the testimony in the cause there was sufficient evidence for the trial court, upon which to predicate its finding that it was for the best interests of the child to remain with the father.

The trial court had the advantage of seeing and hearing the witnesses, and observing their appearance while on the stand, and we think it cannot be said as a matter of law that the testimony was not sufficient to support the

to his home found the door locked. About two weeks later
he returned to the home with the child, accompanied by Mrs.
Robert McDaniel, and endeavored to gain admission, but
it was refused by complaint. It is clear from the testi-
mony that on or about that date there was a separation of
the defendant by the complaint. It is sought to over-
come this by a claimed conversation between the complaint
and the defendant, in the chambers of one of the judges of
the Circuit Court, before whom it appears the case was
pending, in which the latter attempted to reconcile the
parties. The testimony of the witness to this conversation
called by the complaint, indicated that in his opinion she
was inclined to go back to the defendant. Conversations
under such circumstances do not necessarily represent the
free and voluntary acts of the parties, and aside of this
testimony, there does not seem to have been any other
voluntary offer on the part of the complaint to return
to the marriage relationship with the defendant. It further
appears that there had been a preliminary proceeding on the
case, at which the custody of the child had been awarded to
the father, and he had had the child from practically the
date of the separation. From the testimony in the case
there was sufficient evidence for the trial court, upon which
to justify its finding that it was for the best interests
of the child to remain with the father.

The trial court had the assistance of several
hearing the witnesses, and observing their appearance while
on the stand, and we think it cannot be said as a matter of
law that the testimony was not sufficient to support the

decree. The child, a boy, is at the present time between eight and nine years of age. There is no evidence but that he is well cared for.

We find no reason to disturb the decree and for the reasons stated in this opinion the decree of the Circuit Court will be affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

however. The whole of the day, as the people were passing
might not have been of any use. There is no doubt that they
are all well now.

It has been found that the people are all well
and the same as before. It is not known if the people
are all well now.

THEY ARE ALL WELL.

THEY ARE ALL WELL.

H. H. BURKE, doing business as
MIDWAY REALTY CO.,

Appellee,

v.

STEPHEN WINDISCH and FRANCIS
WINDISCH,

Appellants.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of
the court.

The plaintiff in this case, H. H. Burke, doing
business as Midway Realty Co., was during the year 1924, a
duly authorized and licensed real estate broker in the city
of Chicago. The defendants, Stephen Windisch and Frances
Windisch (referred to as Francis Windisch), were the owners
of a certain piece of property known as 6839-41 Ellis avenue,
in the same city. On July 16, 1924, the defendants employed
the plaintiff to procure the sale or trade of the aforesaid
premises, and agreed to pay the usual and customary broker-
age fees. A trial before a jury resulted in a verdict of
\$1,000 and costs, in favor of the plaintiff and against the
defendants. Judgment was entered on this verdict and from
that judgment this appeal is perfected.

The facts in this case show that the plaintiff
had in his employ, in July 1924, a real estate salesman named
Edward L. Spenle; that during the latter part of the month
he met the defendant Stephen Windisch, who listed with him a
certain six-flat building, at a price of \$39,000, for which

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M. E. BERRY, Clerk
M. E. BERRY, Clerk

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Applicant

Opinion filed May 2, 1938.

WILSON WILSON delivered the opinion of

the court

The plaintiff in this case, H. H. Berry, during
his term as Wilson County, was during the year 1934, a
daily newspaper and licensed real estate broker in the city
of Wilson. The defendant, Stephen Wilson and Frances
Wilson (known to as Wilsons), were the owners
of a certain piece of property known as 6000-41 1/2th Avenue,
in the same city. On July 10, 1934 the defendant employed
the plaintiff to procure the sale of the property.
Thereafter, and agreed to pay the usual and customary broker's
fee. A trial before a jury resulted in a verdict of
\$1,000 and costs, in favor of the plaintiff and against the
defendants. Judgment was entered on this verdict and from
that judgment this appeal is presented.

The facts in this case show that the plaintiff
had in his capacity, in July 1934, a real estate sale and was known
Edward L. Berry; that during the latter part of the month
he was in Wilson County, Tennessee, and during this time

he wanted \$16,000 in cash and upon which property there was a first mortgage of \$12,000 and a second mortgage of \$8,000; that at the time the defendant told Spenle that he would sell or trade, and the property was then advertised for sale by the plaintiff in the Chicago Tribune. On or about October 5, one John P. Cowhey, the purchaser of the premises in question, visited the offices of the plaintiff and stated that he had a two-flat building located at 6628 Evans avenue, Chicago, that he desired to sell or trade at a price of \$16,000. On or about October 11, Spenle, while still in the employ of the plaintiff, talked with Windisch and took him to see Cowhey, and the defendants in this action were then shown the property belonging to Cowhey, but no talk was had as to the price. There appears to be no conflict in the testimony as to the foregoing facts. Spenle testified that he saw the defendants during the month of October on several occasions and called them up in regard to the Cowhey property, but the defendants deny this, but admit that they did go with Spenle on October 11, to see the property. On the 27th of October, 1934, a written contract was entered into between Cowhey and the defendants. This deal appears to have been consummated through one Daley who had been doing some business for Greenebaum's bank, during banking hours, and for Mr. Smith, after banking hours. He testified that he also had submitted the Windisch's property to Cowhey, on or about October 25. It is clear from Daley's testimony that at the time he submitted the property to Cowhey, the latter was familiar with the property of the defendants and had already received a proposition for trading his property with the defendants through Spenle, acting for the plaintiff. It is clear from the testimony that Spenle on behalf of the plain-

he wanted \$10,000 in cash and when this property there was a first mortgage of \$12,000 and a second mortgage of \$5,000; that at the time the defendant told Spauld that he would sell or trade, and the property was then advertised for sale by the plaintiff in the Chicago Tribune. On or about October 2, 1924, John F. Gansley, the purchaser of the property in question, visited the office of the plaintiff and stated that he had a two-story building located at 602 West Adams Avenue, Chicago, that he desired to sell or trade at a price of \$12,000. On or about October 11, 1924, while still in the custody of the plaintiff, called at 15 West Adams and took him to see Gansley, and the defendant in this action was then shown the property belonging to Gansley, but no talk was had as to the price. There appears to be no mention in the testimony as to the defendant's visit. Spauld testified that he saw the defendant during the month of October on several occasions and called them up in regard to the Gansley property, but the defendant deny this, but admit that they did go with Spauld on October 11, to see the property. On the 27th of January, 1924, a written contract was entered into between Gansley and the defendant. This deal appears to have been consummated through one Bailey who had been doing some business in the defendant's bank, during banking hours, and for a Mr. Bailey, after banking hours. He testified that he also had contacted the defendant's property to Gansley, on or about October 22. It is clear from Bailey's testimony that at the time he contacted the property to Gansley, the latter was familiar with the property of the defendant and had already received a proposition for trading his property with the defendant through Spauld, acting for the plaintiff. It is clear from the testimony that Spauld on behalf of the plaintiff

tiff was the procuring cause of the sale or deal. It is equally clear that Daley was called into the transaction after the parties had been introduced to each other through the agency of the plaintiff. It is apparent that the parties were brought together in this transaction through the instrumentality of the plaintiff, and the fact that the defendants refused or failed to conclude the sale or trade, through the agency of the plaintiff, does not preclude the latter from recovering his commissions. Francisco v. Coleman, 230 Ill. App. 485. We not only see no reason for reversing the judgment of the trial court, but, under the facts and circumstances, we are of the opinion that no other finding could have been found by that court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND MCDONN, J. CONCUR.

WILLIAM H. PONTOW and WARREN PONTOW,
doing business as Wm. H. Pontow
& Son,

Appellees.

v.

ARVID MORTON and GUNNAR MORTON,
doing business as A. Morton & Bro.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of
the court.

The facts in this case show that William H. Pontow and Warren Pontow, plaintiffs herein, were real estate brokers doing business as Wm. H. Pontow & Son, in the city of Chicago. Arvid Morton and Gunnar Morton, doing business as A. Morton & Bro., defendants herein, were the owners of a certain piece of improved real estate, at the corner of Argyle street and Hoyne avenue in the city of Chicago. This property was improved with an apartment building. It was proposed to place thereon a mortgage for \$60,000, and the purchase price of said property was placed at \$35,000. It was listed for sale by the defendants, and one Elmer W. Grunow, a salesman employed by the plaintiffs, procured a listing of this property with his employers, in the latter part of January, 1924.

From the facts it appears that early in February of that year, he took one Ferdinand Jeske and his wife to the property in question, and showed it to them and discussed with them terms of purchase; and he was advised by the said Jeske

that he was about to sell a piece of property on Winchester avenue, and he would then see what he could do. Grunow later introduced the Jeskes to the Mortons on the premises in question and discussed with them the price of the building. About ten days later he again saw them at the premises and upon his return to the office he prepared a certain submittal slip, dated February 16, 1934, by the terms of which he advised the defendants that he had submitted the property to the Jeskes, although it is apparent from the testimony that this fact should have already been known to the defendants. According to the testimony of Grunow, the defendants advised him that a certain other broker had submitted a proposition to them but that he could rest assured the deal would be made through his office. On April 25, 1934, the property was transferred by the defendants to one Guse, who appears to have been the brother-in-law of Jeske. At the time the deal was consummated a draft for \$13,000, drawn by the Lake View Trust & Savings Bank on the Continental and Commercial National Bank of Chicago, dated April 25, 1934, payable to the order of Ferdinand Jeske and endorsed by him to Morton Bros., was given in payment on the property. It is claimed on behalf of Jeske that it was a loan to his brother-in-law, Guse, but the endorsement of Guse does not appear on the instrument, and Guse failed to testify on the hearing of the cause. The cause coming on to be heard was submitted to a jury and a verdict was returned finding the issues in favor of plaintiff and assessing plaintiff's damages at the sum of \$2,850. A motion for a new trial was overruled and judgment entered on the verdict, from which this appeal is taken.

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that he was about to sell a piece of property on Winchester
avenue, and he would then see that he could do, or
later introduced the matter to the witness on the witness
in question and discussed with him the price of the prop-
erty. About ten days later he again saw him at the premises
and upon his return to the office he prepared a certain
undated slip, dated February 18, 1934, by the terms of which
he advised the defendant that he had admitted the property
to the witness, although it is apparent from the testimony
that this fact should have already been known to the defen-
dant. According to the testimony of Gurney, the defendant
advised him that a certain other person had admitted a prop-
erty to him but that he could not account for the same.
Gurney then saw him in his office. On April 22, 1934, the
property was transferred by the defendant to one Guss, who
appears to have been the same person as the one who at the time
the deal was consummated a check for \$15,000, drawn by the
Lake View Trust & Savings Bank on the Continental and Commercial
National Bank of Chicago, dated April 22, 1934, payable to the
order of Ferdinand J. Guss and endorsed by him to Guss in-
was given in payment on the property. It is claimed on behalf
of Guss that it was a loan to his brother-in-law, Guss, but
the instrument of Guss does not appear on the instrument.
and Guss failed to testify on the hearing of the cause. The
cause coming on to be heard was submitted to a jury and a
verdict was returned finding the action in favor of plaintiff
and assessing plaintiff's damages at the sum of \$5,000. A
motion for a new trial was overruled and judgment entered on
the verdict, from which this appeal is taken.

Considerable stress is laid upon the fact that the plaintiffs failed to show that at the time of the transaction in question neither Grunow, their agent, nor they themselves were licensed real estate brokers. This is based upon the fact that the defendants in their affidavit of defense incorporated therein the statement that they neither admit nor deny that the plaintiffs were licensed brokers, but ask for strict proof thereof. The purpose of pleading is to form clear and distinct issues. The pleading in question did not raise an issue at law. It is a form adopted in equity practice but has no application to pleadings at law. Under such an averment in the affidavit of defense, it became unnecessary for plaintiffs to prove that they were duly licensed brokers, as the statement in the affidavit did not amount to a denial of that allegation. It has been held by this court that it will be presumed that the party bringing a suit for commissions is qualified under the statute until the contrary is shown in the proceedings. This court in the case of Bird v. French, 240 Ill. App. 363, says:

"In view of the foregoing authorities, we are of the opinion that even where the requirement, as to the procuring of a license or of a certificate of registration, is laid down in a statute, the presumption will be that such a license has been procured or such registration has been had in compliance with such statute, until the contrary is shown, in any case where the question arises only collaterally, as is the case in a suit by one subject to such statute, seeking to recover his commissions, fees or other compensation."

There being nothing in the record, showing affirmatively that the plaintiffs were not only duly licensed brokers, we are unable to see any force in this contention on behalf of the defendants. It is also insisted on behalf of the defendants that the court erred in admitting in evidence Plaintiffs'

Unsubstantiated claims are laid upon the fact that the
plaintiffs failed to show that at the time of the transaction
in making a proper transfer, their agent, and they themselves
were licensed real estate brokers. This is based upon the fact
that the defendant is their attorney of defense incorporated
through the instrument that they say they made and that the
plaintiffs were license brokers, but not for any other reason.
The purpose of pleading is to show of law and equity
issues. The pleading in question did not show an issue of law
it is a fact alleged in equity practice but has no application
in pleading of law. Under such an argument in the affidavit
of defense, it became necessary for plaintiffs to prove that
they were duly licensed brokers, as the statement in the affidavit
did not amount to a denial of their allegation. It
has been held by this court that it will be presumed that the
party bringing a suit for rescission is qualified under the
statute until the contrary is shown on the pleadings. This

Exhibit I and II. These exhibits consisted of a letter and a submittal slip, advising defendants of the fact that they had submitted to them the names of the Jeskes as possible buyers. We see no force in this contention, particularly in view of the fact that the defendant Arvid Morton himself stated on the stand on direct examination, that he had received a copy of the submittal slip. It is also urged as ground for reversal, that the court erred in refusing to admit in evidence a letter dated October 10, 1924, signed by counsel for the plaintiffs and directed to the defendants, in which a demand was made for the commission due; and also a letter dated October 14, 1924, addressed to counsel for plaintiffs signed by counsel for defendants, in which a denial was made of the fact that the property had been sold to Ferdinand Jeske. We are of the opinion that the court properly sustained an objection to these letters. They were both self serving documents and were prepared and mailed after the transaction had been completed, and they were signed by the attorneys for the parties and not by the parties themselves. We cannot see that the refusal to receive these letters in evidence in any way prejudiced the defendants and could have added nothing to the consideration of the cause by the court or jury. It is also urged that the court in the course of the proceedings made certain statements and remarks which were prejudicial to the defendants. An examination of the testimony, however, fails to show that the remarks or statements were of a character that would be prejudicial. The question as to whether or not the purchaser of the property was, in fact, Jeske and not his brother-in-law, Guse, was one of fact which we are of the

Exhibits 1 and 2, these exhibits consisted of a letter and
a receipt slip, which were submitted to the jury and
not admitted as then the names of the person or persons
before. He was in force in this connection, particularly
in view of the fact that the defendant would have been
stated on the stand on direct examination, that he had received
a copy of the exhibit slip. It is also noted as stated
from records, that the court order in relation to state in
relation to the exhibit slip, dated October 12, 1934, signed by court
and the exhibit slip is attached to the exhibit slip, and
a receipt slip was given to the defendant and the exhibit slip
dated October 12, 1934, and the exhibit slip is attached to the
exhibit slip, and the exhibit slip is attached to the exhibit slip
at the time the exhibit slip was given to the defendant.
In relation to these facts, they were not self-evident
documents and were produced and called at the time the
had been completed, and they were called by the state for
the parties and not by the parties themselves. It cannot
be that the witness in relation to these facts is sufficient in
any way to establish the defendant and could have called nothing
it was a consideration of the same by the state or jury. It
is also noted that the name in the name of the proceedings
made certain statements and records which were prejudicial
to the defendant. An examination of the testimony, however,
tells us that the records or statements were of a character
that could be prejudicial. It is noted as to whether or not
the purchase of the property was, in fact, made and not
the purchase-in-law, that, was one of fact which we are of the

opinion was fully sustained and borne out by the testimony. The fact that Ouse failed to appear and testify are circumstances which the jury probably considered in arriving at its verdict, as well as the fact that the purchase price was paid by Jeske, and the draft endorsed over directly to the defendants without going through the hands of the purported brother-in-law.

We see no reason for disturbing the verdict and for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLLOCH, J. CONCUR.

opinion was fairly summarized and carried out by the majority.
The fact that they failed to appear and testify is also
taken into account with the jury probably constituted in arriving
at the verdict, as well as the fact that the defendant's plea
was held by the jury, and the doubt enhanced over directly
to the defendant without going through the hands of the jury.
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So too no reason for withdrawing the verdict and
for the reasons stated in this opinion, the judgment of
the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAMM, J. L. AND ROBERT, J. JJ.

ARTHUR ROSENBERG, DOING BUSINESS
as SUMMIT ELECTRIC CO .

Appellee,

v.

R. H. FANKER,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the
court.

This was an action to recover for labor and material furnished at the instance and request of the defendant. A jury was waived and the case submitted to the court, and finding and judgment entered in favor of the plaintiff in the sum of \$47.45. The only grounds for reversal appear to be; that the witness Rosenberg failed to qualify before testifying as to the reasonable value of the services rendered and material furnished. As to the first ground of objection, it appears that Rosenberg had been in the electrical business for seven years; that he was the owner of the company and his duties were to supervise and superintend work contracted for with the company. We see no reason why he was not qualified to testify as to these values, pertaining as they did to electrical equipment and labor in connection therewith, and we can see no good reason for the perfecting of this appeal. The amount involved was \$47.45. The work was done at the request of the defendant and upon premises owned by him.

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Opinion filed May 8, 1938.

MR. JUSTICE WILSON delivered the opinion of the

court.

This was an action to recover for labor and material

furnished at the instance and request of the defendant. A

jury was waived and the case submitted to the court, and

finding and judgment entered in favor of the plaintiff in the

sum of \$47.45. The only grounds for reversal appear to be:

that the witness Rosenberg failed to qualify before testify-

ing as to the reasonable value of the services rendered and

material furnished. As to the first ground of objection, it

appears that Rosenberg had been in the electrical business

for seven years; that he was the owner of the company and his

affian were to supervise and superintend work contracted for

with the company. We see no reason why he was not qualified

to testify as to those values, pertaining as they did to

electrical equipment and labor in connection therewith, and

we see no good reason for the granting of this appeal.

The amount involved was \$47.45. The work was done at the re-

quest of the defendant and upon promises made by him.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F. J. AND HOLCOMB, J. CONCUR.

THE UNIVERSITY OF CHICAGO

DEPARTMENT OF THE HISTORY OF ARTS

CHICAGO, ILLINOIS

THE UNIVERSITY OF CHICAGO

WILLIAM H. BROWN & CO.,
a corporation,

Appellant,

v.

JOHN F. OWENS and NICHOLAS SCHMIDT,
et al,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The complainant, William H. Brown & Co., a corporation, filed its bill in the Circuit Court of Cook County to foreclose a mechanic's lien upon premises owned by the defendant John F. Owens, at the time of the agreement hereinafter referred to and later by the defendant Nicholas Schmidt. The bill charges that the complainant and the defendant Owens entered into a contract in writing, by the terms of which the complainant was to move a certain building, commonly known as a residence, from one lot in the city of Chicago to the lot in question, owned by the defendant Owens. The contract was entered into on September 27, 1924, and notice of lien was filed of record on February 16, 1926. It is further charged in said bill that the last work on the premises in question, was done on October 17, 1925. The joint and several answers of the defendants John F. Owens and Nicholas Schmidt, filed in said cause, denied that the complainant was entitled to relief, because the placing of the house on the lot in question violated a city ordinance and was, therefore, void and the complainant not entitled to recover.

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WILLIAM H. BROWN & CO.,
a corporation

Appellant

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY,

JOHN F. OWENS and NICHOLAS SCHMIDT,
et al.,

Opinion filed May 8, 1938.

MR. JUSTICE FRANK delivered the opinion of the

The complainant, William H. Brown & Co., a corporation, filed this bill in the Circuit Court of Cook County to foreclose a mechanic's lien upon premises owned by the defendant John F. Owens, at the time of the agreement herein after referred to and later by the defendant Nicholas Schmidt. The bill charges that the complainant and the defendant Owens entered into a contract in writing, by the terms of which the complainant was to move a certain building, commonly known as a restaurant, from one lot in the city of Chicago to the lot in question, owned by the defendant Owens. The contract was entered into on September 27, 1935, and notice of lien was filed of record on February 18, 1936. It is further charged in said bill that the last work on the premises in question, was done on October 17, 1935. The joint and several agreement of the defendants John F. Owens and Nicholas Schmidt, filed in said cause, denied that the complainant was entitled to relief, because the placing of the house on the lot in question violated a city ordinance and was, therefore, void and the complainant not entitled to recover.

From the facts it appears that the lot in question was a 25 foot lot and the house which was to be moved and placed thereon was 22 feet 4 inches in width. At the time of the making of the aforesaid contract there was in full force and effect, in the City of Chicago, a certain ordinance which was known as section 488 of the Municipal Code of Chicago of 1922, requiring (among other things) that "in every building hereafter erected for or converted to the purpose of Class III, there shall be a space of at least three feet between the building and the lot line on one side, and a space of at least one foot between the building and the lot line on the other side." The classification known as Class III referred to residences. It is a fair inference to be drawn from the testimony that at the time said contract was entered into by the complainant and the defendant Owens, it was known by both parties that the building in question, when placed upon the lot in question, would not comply with the city ordinance. It appears further that a permit was granted to move said building, and that after it had been placed upon the lot which was located at 3553 North Marshfield Avenue, in the city of Chicago, the work was stopped by the city authorities, upon the complaint of adjoining property owners. It appears that after the work was stopped no further work was done upon this property by the complainant, other than the removal of material belonging to him, which was still upon the premises. Moreover, after the said work was stopped and before the material was removed by complainant, the premises were sold to one Laubschier, who in turn conveyed the property to the defendant Schmidt, the present owner.

From the facts it appears that the lot in question

was a 50 foot lot and the house which was on it was moved and placed thereon was 25 feet 6 inches in width. At the time of the making of the aforesaid contract there was in fact some and effect in the City of Chicago, a certain ordinance which was known as Section 452 of the Municipal Code of Chicago of 1905, regarding (among other things) that "in every building hereafter erected for or converted to the purpose of dwelling there shall be a space of at least three feet between the building and the lot line on one side, and a space of at least one foot between the building and the lot line on the other side." The ordinance known as Section 452 related to tenements. It is a fair inference to be drawn from the testimony that at the time said contract was entered into by the complainant and the defendant herein, it was known to both parties that the building in question, when placed upon the lot in question, would not comply with the said ordinance. It is also further that a permit was granted to have said building, and that after it had been placed upon the lot which was located at 3535 North Hennepin Avenue, in the City of Chicago, the work was stopped by the city authorities upon the complaint of adjoining property owners. It appears that after the work was stopped no further work was done upon this property by the complainant, other than the removal of material belonging to him, which was still upon the premises. However, after the said work was stopped and before the material was removed by complainant, the premises were sold to one Landwehr, who in turn conveyed the property to the defendant herein, the present owner.

It is apparent from the testimony that after the stopping of the work in question, nothing further was done under this contract, although it appears that subsequently Laubmeier cut down one side of the building to conform to the city ordinance, but this work was done by him and not under the contract in question.

The trial court found that the purpose of the contract was in violation of the city ordinance and contrary to the law and that, therefore, the complainant was not entitled to recover, and dismissed its bill. It is a well established principle of law that a contract, which, by its terms, violates a statute or a city ordinance, is not enforceable; and courts of law will not relieve where the parties are undertaking by contract to do something expressly prohibited either by statute or ordinance. This court in the case of Western Cold Storage Co. v. Estate of Joseph Kaufman, 204 Ill. App. 477, in its opinion says:

"There can be no enforceable contract, either express or implied, which by its terms violates a statute or city ordinance. In Nash v. Monheimer, 20 Ill. 216, the court said:

"It is a rule of the common law that all contracts in violation of its principles, or opposed to legislative enactments, or that are opposed to public policy, are void. The object of all laws is to repress vice and to promote the general welfare of the State or society; and an individual shall not be assisted by the law, in enforcing a demand originating in a breach or violation, on his part, of its principles or enactments." Armstrong v. Taylor, 11 Wheat. (U.S.) 288."

The Supreme Court of this State in the case of Ellison v. Adams Express Company, 245 Ill. 410, in its opinion says:

It is apparent from the testimony that at the time of the shooting of the victim, the defendant was alone in the room. This is in fact the only evidence that the defendant was alone in the room at the time of the shooting. The fact that the defendant was alone in the room at the time of the shooting is a material fact in this case. The fact that the defendant was alone in the room at the time of the shooting is a material fact in this case. The fact that the defendant was alone in the room at the time of the shooting is a material fact in this case.

The trial court found that the purpose of the ordinance was in violation of the city ordinance and contrary to the law and fact, therefore, the complaint was not sustained to recover, and dismissed the bill. It is a well established principle of law that a contract, which by its terms violates a statute or a city ordinance, is not enforceable; and courts of law will not relieve where the parties are contracting by contract to do something expressly prohibited either by statute or ordinance. This court in the case of Wright v. State of Texas, 107 Tex. 689, 1920, 1921, 200 S.W. 2d 1077, in the opinion of the court.

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THE SUPREMACY OF THE STATE OF NEW YORK

"The general rule of law is that a contract made in violation of a statute is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover. Among other authorities cited is the case of Miller v. Amson, 145 U. S. 481. There the defendant, a citizen and resident of Wisconsin, purchased of the plaintiff, in Chicago, a quantity of wine and suit was brought in Iowa to recover the price. The defense was that an ordinance of the city prohibited the sale of spirituous or vinous liquors in quantities of one gallon or more without a license having been obtained therefor; that the plaintiff had not obtained such license and the sale was in violation of the ordinance. It was held that there could be no recovery, the court saying, there is 'nothing in the language of the ordinance or the subject-matter of the regulations which excepts this, case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce.'"

Both parties in the case at bar were financially interested in having a thing done which was contrary to the ordinance of the city of Chicago. The complainant was to be reimbursed by reason of the removal of the building to the lot in question, knowing that it would be in violation of the city ordinance to place it upon the lot in question under the terms of his contract, and he was therefore as much involved in the attempt to defeat the ordinance as the party with whom he had contracted, namely, the owner. Courts will not aid such parties in obtaining relief from a situation in which they have placed themselves with full knowledge of such facts.

In view of the fact that the character of the contract is controlling on the question of the right of the complainant to recover, it is not necessary to pass on the question as to whether or not the removing of the material in question

from the premises was the doing of such work as would necessarily enhance the value of the same so as to bring the time of the filing of the mechanic's lien within the statute, and that question is therefore not considered.

For the reasons stated in this opinion the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND HOLDOM, J. CONCUR.

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1. Health of the Nation (1982) by Dr. David Keegan

1943

1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738

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382 - 32323

240 I.A. 501

LEWIS A. LAWSON,

Appellee,

v.

S. J. MCKNAB,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim in this cause is for damages sustained by an automobile of the plaintiff by reason of the negligence in the operation of the automobile of the defendant or his agent or employee. The affidavit of defense denied the damage to the automobile and further denied that the defendant or his employees were in operation of the said automobile at the time in question, or that it was operated in a careless and negligent manner. The cause was tried by a jury, resulting in a verdict for \$460.00, in favor of the plaintiff. A motion for a new trial was overruled and a motion in arrest of judgment was overruled and judgment entered on the verdict. From this judgment the defendant appeals and the cause is before this court for consideration.

The facts, very briefly, disclose that the automobile of the plaintiff was parked on Halsted street near its intersection with 78th street in the city of Chicago, on or about January 8, 1925; that on the day in question

243 I.A. 831

355 - 3555

APPEAL FROM
MUNICIPAL COURT
IN
CRIME
JAMES A. LARSON
Appellant
v.
J. J. LARSON
Appellee

Opinion filed May 3, 1938.

MR. JUSTICE WILSON delivered the opinion of

the court.

The statement of claim in this cause is for damages sustained by an automobile of the plaintiff in reason of the negligence in the operation of the automobile of the defendant or his agent or employee. The plaintiff of defense denies the damage to the automobile and further denies that the defendant or his employee were in operation of the said automobile at the time in question, or that it was operated in a careless and negligent manner. The cause was tried by a jury, resulting in a verdict for \$400.00, in favor of the plaintiff. A motion for a new trial was overruled and a motion in arrest of judgment was overruled and judgment entered on the verdict. From this judgment the defendant appeals and the cause is before this court for consideration.

The facts, very briefly, disclose that the automobile of the plaintiff was parked on United Street near its intersection with 75th Street in the city of Chicago, on or about January 2, 1938; that on the day in question

Hugh McShane, son of the defendant, was driving his father's car over and along Halsted street; he testified that he was going to get some cigarettes; that his father was not in the car at the time of the accident nor had he sent him on any errand; that at the time he was about 19 years of age; that there was a big truck standing near 80th street, which started to move; that he did not have room to go to the west side of the street but started the other way and the front wheels of the car caught in the flange of the rails of the street car track; that the wheel spun out of his hand and before he could get hold of it again he had struck the car owned by the plaintiff.

At the close of all the testimony, counsel for plaintiff moved the court to direct the jury to find a verdict for the plaintiff. Objection was made and overruled. Thereupon the court instructed the jury as follows:

"Objection overruled; gentlemen, you have heard the motion which has been made by counsel for the plaintiff; the Court instructs you to return a verdict of guilty against the defendant and after having heard the argument, to fix the amount of the damages which you think the plaintiff is entitled to in this case."

Counsel thereupon proceeded to argue the case, and after argument the court instructed the jury as follows:

"Your verdict is as follows: We the jury find the defendant guilty in manner and form as charged in plaintiff's statement of claim and assess the plaintiff's damages at the sum of blank dollars, fixing the entire amount that you in your judgment think from the evidence that the plaintiff is entitled to by way of damages."

To this instruction the defendant excepted.

Hugh Williams, owner of the building, was driving his
taxi cab over and along Belmont Street; he testified
that he was going to get some cigarettes; that his taxi
was not in the lot at the time of the accident nor had he
sent him on any errand; that at the time he was about 15
years of age; that there was a big truck standing near 50th
Street, which started to move; that he did not have room
to go to the west side of the street but started the other
way and the front wheel of the car caught in the flange
of the rails of the street car track; that the wheel came
out of his hand and before he could get hold of it again
he had struck the car owned by the plaintiff.

At the close of all the testimony, counsel for

plaintiff moved the court to direct the jury to find a
verdict for the plaintiff. Objection was made and over-

ruled. The court then instructed the jury as follows:
"You are to find the facts as you believe them to be from
the evidence which has been presented to you. You are to
find the facts as you believe them to be from the evidence
which has been presented to you. You are to find the facts
as you believe them to be from the evidence which has been
presented to you. You are to find the facts as you believe
them to be from the evidence which has been presented to you."

Counsel for the defendant then moved the jury to find a
verdict for the defendant. Objection was made and over-

ruled. The court then instructed the jury as follows:
"You are to find the facts as you believe them to be from
the evidence which has been presented to you. You are to
find the facts as you believe them to be from the evidence
which has been presented to you. You are to find the facts
as you believe them to be from the evidence which has been
presented to you. You are to find the facts as you believe
them to be from the evidence which has been presented to you."

There were several questions of fact involved in the case which it became the province of the jury to determine. Among others, it became necessary to pass upon the question as to the ownership of the car; the question of negligence on behalf of the defendant, through his agents or servants; the question as to whether or not the son at the time of the accident, while driving the car of his father, was driving it with the father's consent and approval, or in and about the father's business. The question of damages was also involved and the jury should have been properly instructed as to the manner in which it should arrive at its verdict with regard to the amount of damages which it could legally assess. It is not necessary in this case to discuss or consider other questions raised by counsel as to errors occurring during the trial. It was beyond the province of the court to instruct the jury to find the issues in favor of the plaintiff. The defendant had a right to have these various questions passed upon by the jury under proper instructions. The instruction in regard to damages was entirely unenlightening and there was no rule given to the jury by which it could be guided in its deliberations. That question was left entirely to the judgment of the jury. Consequently there was opened a speculative field for consideration, of which the jury apparently availed itself in arriving at its verdict. As to the question of the responsibility of a parent, - the defendant in this case - by reason of the fact that his car was being driven at the time by his minor son, the Supreme Court of this State, in the case of Arkin v. Page, 387 Ill. 420, on page 425 says:

There were several questions of fact involved in the case which it seems the province of the jury to decide. Among others, it became necessary to pass upon the question as to the ownership of the car; the question of negligence on behalf of the defendant, through his agent or servants; the question as to whether or not the car at the time of the accident, while driving the car of his father, was driving it with the father's consent and approval, or in and about the father's business. The question of damages was also involved and the jury should have been properly instructed as to the manner in which it should arrive at its verdict with regard to the amount of damages which it would legally assess. It is not necessary in this case to discuss or raise or other questions raised by counsel as to errors occurring during the trial. It was beyond the province of the court to instruct the jury to find the issues in favor of the plaintiff. The defendant had a right to have these various questions passed upon by the jury under proper instructions. The instruction in regard to damages was entirely misleading and it is not fair to say that the jury was misled by it which it could be said in its deliberations. That question was left entirely to the judgment of the jury. Consequently there was opened a speculative field for consideration, of which the jury expressly availed itself in arriving at its verdict. As to the question of the responsibility of a parent, - the defendant in this case - by reason of the fact that his car was being driven at the time by his minor son, the law was clear at this point, in the case of Allen v. Allen, 235 N. H. 220, 221, 222.

"It seems rather a fantastic notion that a son in using the family automobile to take a ride by himself for pure pleasure is the agent of his father in furnishing amusement for himself, is really carrying on his father's business, and that his father, as principal, should be liable for the result of the son's negligent manner of furnishing the entertainment to himself."

It cannot be said in this case that the evidence as to the agency of the son, while driving the car of his father, was so clearly established that a court could say, as a matter of law, that the father was responsible for an accident occurring while the car was being driven by his son, under the circumstances as shown by the evidence in the case at bar. That question was one of fact which should have been submitted to the jury for its consideration. The giving of this instruction was erroneous.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A
NEW TRIAL.

TAYLOR, F.J. AND WILSON, J. CONCUR.

| | | |
|------------------------------|---|-----------------|
| SWARTS BROD., a corporation, |) | |
| |) | |
| Appelles, |) | APPEAL FROM |
| |) | |
| v. |) | MUNICIPAL COURT |
| |) | |
| |) | OF CHICAGO. |
| COYT THEATRE COMPANY, |) | |
| a corporation, |) | |
| |) | |
| Appellant.) |) | |

Opinion filed May 3, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

This was a case of the fourth class on a contract, brought in the municipal Court of Chicago. The cause was tried by the court without a jury and the issues were found in favor of the plaintiff and a judgment was entered upon the finding, in the sum of \$90 and costs. The suit was based on an assignment of wages and in support of the plaintiff's claim a certain statement of claim was filed, charging that the plaintiff was the assignee and bona fide owner of a certain chose in action, known and described as an assignment of wages, executed by one Toomey, an employee of the said defendant, on or about the 9th day of August, 1926, and delivered by the said Toomey to the plaintiff on or about that date. The assignment was in writing and is set out in the amended statement of claim. Accompanying the statement of claim was a certain affidavit, subscribed and sworn to by the attorney for the plaintiff. This affidavit does not state that the plaintiff was the actual bona fide owner of the chose in action. Counsel for the defendant moved to strike plain-

Opinion filed May 8, 1938.

Justice Wilson delivered the opinion of the court.

This case is one of the many cases which have been brought to the attention of the court. The court was divided at the time of the trial and the issue was found in favor of the plaintiff and a judgment was entered upon the merits. It is now a matter of fact that the plaintiff on an assignment of wages and in support of the plaintiff's claim a certain statement of claim was filed, charging that the plaintiff was the assignee and paid the wages of a certain person in action, known and described as an assignment of wages, executed by one Tommy, an employee of the said defendant, on or about the 25th day of August, 1938, and delivered by the said Tommy to the plaintiff on or about that date. The assignment was in writing and is set out in the annexed statement of claim. Accompanying the statement of claim was a certain affidavit, subscribed and sworn to by the attorney for the plaintiff. This affidavit does not state that the plaintiff was the actual paid owner of the claim in action, known as the defendant named as assignee of wages.

tiff's amended statement of claim from the files, which motion was overruled and an exception taken thereto. The cause then proceeded to a hearing; defendant electing to stand by its motion, and it is upon this record that the cause comes before us for consideration.

It is insisted by plaintiff in support of the judgment that the statement in the affidavit, namely, "that the nature of plaintiff's demand is as stated," referred to the amended statement of claim and was sufficient in that there was an allegation in the amended statement of claim that plaintiff was the actual bona fide owner of the assignment in question.

Claims of this character are not assignable except by reason of Section 18, of chapter 110 of Cahill's Illinois Statutes. Such a statute, which confers the right of assignment upon the assignee of such a claim, is in derogation of the common law and must be strictly construed. That statute provides that the assignee shall in his pleading, on oath or by affidavit where a pleading is not required, allege specifically that he is the actual bona fide owner. There is no statement in the affidavit in the case at bar that the plaintiff was the actual bona fide owner of the chose in action on which the cause was predicated, and the allegation "that the nature of plaintiff's demand is as stated," is so vague and uncertain that it would be impossible to predicate perjury upon it. The nature of plaintiff's demand means that the cause of action is one predicated upon an assignment of a contract, but the fact that the plaintiff is a bona fide owner of the assignment is a requirement of the

bill's amended statement of claim from the files, which

motion was overruled and an exception taken thereon.

The cause then proceeded to a hearing at defendant's request.

It is stated by the motion, and it is upon this record that the

cause comes before us for consideration.

It is insisted by plaintiff in support of the

claim that the statement in the affidavit, namely, "that

the nature of plaintiff's demand is as stated," referred to

the amended statement of claim and was sufficient in that

there was an allegation in the amended statement of claim

that plaintiff was the actual bona fide owner of the assignment

in question.

It is insisted by defendant in support of his motion that

by reason of Section 18, of Chapter 116 of Illinois

Statutes, such a statute, which confers the right of assign-

ment upon the assignee of such a claim, is in derogation of

the common law and must be strictly construed. That statute

provides that the assignee shall in his pleading, on oath

or by affidavit, show a pleading as set forth, and

that the nature of plaintiff's demand is as stated, and

is an allegation in the affidavit in the case at bar that

plaintiff was the actual bona fide owner of the claim in

action on which the cause was prosecuted, and the allegation

that the nature of plaintiff's demand is as stated, is

in violation of the statute, and is therefore inadmissible in law.

The nature of plaintiff's demand is as stated, and

means that the nature of the action is one prosecuted upon an

assignment of a contract, but the fact that the plaintiff is a

bona fide owner of the assignment is a requirement of the

statute that should be contained in the affidavit and is not sufficiently covered by the vague and uncertain reference to the statement of claim contained in the affidavit filed in the cause. Madison & Kedzie State Bank v. Old Reliable Motor Truck Company, 286 Ill. App. 442; Callagher v. Schmidt, et al., 313 Ill. 40.

Upon the amended statement of claim and the affidavit thereto attached, the trial court should have entered judgment for the defendant, because of an insufficient affidavit in compliance with the statute. For that reason and the reasons stated in this opinion, the judgment of the Municipal Court will be reversed and judgment entered here for the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P. J. AND HOLDEN, J. CONCUR.

415 - 32356

FIRST ACCEPTANCE CORPORATION,
a corporation,

Appellee,

v.

STEWART-ZEEB MOTOR SALES CO.,
a corporation,

Appellant.)

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff's statement of claim alleges that on the 20th day of October, A. D. 1925, one G. E. Stewart gave to the Stewart-Zeeb Motor Sales Co. a note in the sum of \$560.87, due in sixty days; that for a valuable consideration, before maturity, and in due course of business it was endorsed by the defendant and delivered to the plaintiff. It further charges that there is now due on said note the sum of \$328.65. Defendant's affidavit of merits admits that it endorsed and delivered the note in question, as outlined in the statement of claim, but sets up that it was not delivered in the due course of business and that the note was without consideration. The affidavit of defense sets out in extenso certain facts which, it is charged by the defendant, show a want of consideration. It is not necessary to consider that question.

The cause was tried before the court without a jury, and upon the hearing the plaintiff introduced the note in evidence and rested. The defendant introduced no evidence, and thereupon the court entered judgment in the amount claimed to

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and upon the hearing the District Attorney introduced the evidence and called the witnesses and testified that the defendant introduced no evidence, and the court entered judgment in the amount claimed.

be due, from which judgment this appeal is prayed and allowed.

The only ground for reversal urged in this appeal is that the court erred in entering judgment upon the note upon the failure of the defendant to introduce certain additional proof. It is urged in defendant's behalf that it was incumbent upon the plaintiff to introduce proof to identify the note and make proof of the amount due. The statement of claim specifically described the note and stated the amount due. The execution and delivery of this note was admitted by the affidavit introduced. The introduction of the note was sufficient to make out a prima facie case, and in the absence of evidence to the contrary, the amount claimed in the statement of claim, substantiated by the note, which was for a greater amount, was sufficient upon which to predicate the judgment. The want of consideration, another matter set up in the affidavit of defense was properly a matter provable in the cause, if any such consideration existed. Clarke v. Newton, 235 Ill. 530; Astry v. Fox River Distilling Co., 182 Ill. App. 339.

For the reason stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND WILSON, J. CONCUR.

EUGENE F. WHITE,

Appellee,

v.

CHICAGO ACCEPTANCE CORPORATION,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim filed in this case charges that on the 4th day of March, A. D. 1927, the plaintiff was possessed of a certain Ford car and a full kit or set of plumbing tools, of the value of \$300; and that on the same date they came into the possession of the defendant, by finding; but that upon demand the defendant has refused to return the goods and chattels of the plaintiff. The affidavit of defense, filed in answer to the statement of claim, denies the coming into possession of said property, and also that it has converted said property to its own use. A jury was waived and the cause heard by the court, resulting in a finding in favor of the plaintiff in the sum of \$175.00, and judgment was entered on the finding, from which judgment this appeal is perfected.

The facts show that one Eugene F. White, plaintiff, purchased a car from the defendant in October, 1926, for \$125.00; that he had paid \$50 down and was to pay the balance in monthly payments of \$12.00 each; that in January of the following year

payments of \$3.00 each, that in January of the following year.

the car was stolen and certain tires were stripped from the car; that it was later taken possession of by defendant; that he went to the place where the car was found; that there were two men sent there by the defendant who had taken possession of the car; that he demanded the kit of tools, and offered a two month's payment, but that the men would not accept it, and took the car. He testified that underneath the seat of the car were the plumber's tools and their value was \$208.82; that the value of the tires was \$36 or \$37. Objection is raised by the defendant that the plaintiff, in placing a value upon the plumbing tools, failed to qualify for the purpose of giving testimony as to their value. It appears further that a certain receipted bill was introduced in evidence, dated November 15, 1926, which was objected to by the defendant. It contained a list of the plumbers' tools and the prices of the same.

The cause was heard before the court without a jury and the presumption arises that the court considered only such testimony as was material. From a reading of the testimony, it may be gathered that the plaintiff was a plumber and as such would necessarily be competent to testify as to the value of tools of a character used by plumbers. We do not believe that it was proper to show the value of the lost tires, as it appears they were on the machine in question at the time it was stolen, but the finding of the court was for \$175.00, which was less than the value of the tools and would indicate that the court had not considered the value of the tires in arriving at the amount of the judgment.

the car was stolen and certain things were obtained from
the car; that it was later taken possession of by defendant;
that defendant to the place where the car was found; that
there were two men sent there by the defendant who had
taken possession of the car; that he demanded the kit of tools
and offered a two month's payment, but that the men would not
accept it, and took the car. He testified that immediately
the seat of the car were the plaintiff's tools and their
value was \$100.00; that the value of the tools was \$100 or
\$125. Plaintiff is raised by the defendant that the plain-
tiff, in placing a value upon the missing tools, failed to
qualify for the purpose of giving testimony as to their
value. It appears further that a certain recorded bill
was introduced in evidence, dated January 18, 1931, which
was objected to by the defendant, it contained a list of
the plaintiff's tools and the value of the same.

The court was heard before the court without
a jury and the prosecution raises that the court considered
only such testimony as was material. From a reading of the
testimony, it may be gathered that the plaintiff was a
plumber and as such would necessarily be competent to testify
as to the value of tools of a character used by plumbers.
We do not believe that it was proper to show the value of the
lost tools, as it appears they were on the machine in question
at the time it was stolen, but the finding of the court
was for \$125.00, which was less than the value of the tools
and would indicate that the court had not considered the value
of the tools in arriving at the amount of the judgment.

The plaintiff testified that the tools were in the car at the time it was stolen, and this was denied by Shulene and Berg, employees of the defendant. It is argued by defendant that plaintiff admitted that the tools might have been taken out of the car while it was in the garage, but the plaintiff testified that he saw them in the car on the morning of the day that the car was taken.

The trial court was in a position to see and observe the witnesses, and we cannot say, as a matter of law, that the weight of the evidence is so overwhelming that the judgment should be set aside. The amount involved is small and we can see no good reason for reversing the judgment.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, F.J. AND HOLCOM, J. CONCUR.

The plaintiff testified that the facts were in the
out of the time it was given, and this was denied by the
and large employees of the defendant. It is argued by de-
fendant that plaintiff's testimony was not credible and that
there was no way to prove it was true. The plaintiff
plaintiff testified that he was not in the car at the time
of the accident and was not injured.

The court found that the plaintiff's testimony was
not credible, and so found for the defendant. The
weight of the evidence is so overwhelming that the
plaintiff cannot be said to have proved his case.
The court found for the defendant.

The court found for the defendant.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

THE COURT FINDS FOR THE DEFENDANT.

32465

GEORGE MOORE,

Appellant,

v.

E. L. FERGUSON,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 2, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim in this case is based on a narr. and cognovit. The suit was filed December 17, 1926, and the statement of claim alleges that there was due the plaintiff the sum of \$185.00 on four certain notes. Judgment was entered for \$225.00 on December 17, 1926. Execution was entered on the judgment on that date, and a motion was subsequently made by the defendant, to vacate the judgment and for leave to come in and defend. Execution was stayed and defendant filed his affidavit of merits, which was stricken from the files and an amended affidavit of merits was filed, in which it was alleged that the defendant had formerly been married to one Wilma Ferguson, who obtained a divorce from him on February 2, 1924; the decree providing that the defendant should pay certain sums of money as alimony to the said Wilma Ferguson. The amended affidavit of merits further charges that the said Wilma Ferguson and the defendant E. L. Ferguson agreed between themselves that the defendant should issue and deliver to her certain notes, in full of the

924 A. S.

1133

Continued on
May 8, 1981

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alimony claims, and that thereupon said notes were executed. It further charges that the said Wilma Ferguson, at the time of the execution and delivery of said notes, had remarried on or about May, 1924, and that this fact was unknown to the defendant; that one Mary Moore, mother of the said Wilma Ferguson, knowing the facts, endorsed the notes and deposited them at the bank for collection; that the plaintiff in this suit was the husband of the said Mary Moore and was not a holder in due course; and that he was cognizant of all the facts. A motion was made to strike this later amended affidavit of merits, which motion was denied, and an order was entered denying a jury trial and the cause was heard by the court. On the trial the issues were found in favor of the defendant and against the plaintiff, and the judgment order of December 17, 1926, was vacated and set aside. An appeal was prayed and allowed to this court and this cause is now before us for consideration.

From the facts it appears that the said Wilma Ferguson obtained a divorce in Cook County in 1924 from the defendant; that she remarried in May, 1924; and that the defendant Ferguson was remarried in June, 1924. According to the testimony of the defendant she informed him over the telephone, in August, 1924, that she had remarried. It therefore appears that this fact was known to the defendant prior to the time of the execution of the notes in question. Moreover, it appears from endorsements on the back of the notes that in the months of May and July, 1925, he made payments on said notes, in the sum of \$30.00 each. The defendant testified that at the time the notes were executed, Mary Moore gave to the

At the time the notes were executed, Mary Moore gave to the witness, in the sum of \$100.00, the witness testified that the months of May and June, 1934, he made payments on said \$100.00 from the proceeds of the sale of the notes that in the time of the execution of the notes in question. However, there appears that this fact was known to the Defendant prior to the execution of the notes, in August, 1934, that the Defendant, in the testimony of the Defendant she informed him over the Defendant's testimony was executed in June, 1934. According to the testimony of the Defendant in May, 1934, and that the Defendant obtained a divorce in April, 1934, from the time the fact is apparent that the said wife.

said Wilma Ferguson, \$600.00 and the notes were delivered by the defendant to the said Mary Moore.

We are at a loss to understand upon what theory the court entered judgment for the defendant. Not only is there an entire absence of any evidence of fraud in the procuring of the execution and delivery of the notes, but from defendant's own testimony it is apparent that he was familiar with all the facts at the time of the signing and the delivery of said notes. Moreover, there is an entire absence of evidence bearing on the question as to whether or not the plaintiff, George Moore, took the notes with any knowledge of the facts set up in amended affidavit of defense.

In view of the facts, as already related, we are of the opinion that the trial court erred in entering judgment for the defendant.

For the reasons expressed in this opinion, the judgment of the Municipal Court will be reversed and the cause remanded to that court with directions to vacate the judgment of November 3, 1927, in favor of the defendant, and to expunge same from the record, and to reinstate the judgment of December 17, 1926, in favor of the plaintiff and against the defendant.

JUDGMENT REVERSED WITH DIRECTIONS.

TAYLOR, P.J. AND HOLCOMB, J. CONCUR.

and William Ferguson, \$500.00 and the notes were delivered by the defendant to the said party herein.

We are at a loss to understand upon what theory the court entered judgment for the defendant. Not only is there no positive evidence of any evidence of fraud in the procuring of the execution and delivery of the notes, but from defendant's own testimony it is apparent that he was familiar with all the facts at the time of the signing and the delivery of said notes. Moreover, there is no positive evidence of evidence, bearing on the question as to whether or not the plaintiff, George Hertz, took the notes with any knowledge of the facts set up in amended affidavit of defense.

In view of the facts, as already related, we are of the opinion that the trial court erred in entering judgment for the plaintiff.

For the reasons expressed in this opinion, the judgment of the Municipal Court will be reversed and the cause remanded to that court with directions to vacate the judgment of November 3, 1937, in favor of the defendant, and to award costs from the record, and to reinstate the judgment of November 17, 1936, in favor of the plaintiff and against the defendant.

REVEREND JUSTICE OF THE PEACE

TAYLOR, J. J. AND WILSON, J. J. JUDGES.

A. BURKE,
Appellee,

v.

WILLIAM J. CONROY and
HELEN CONROY,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for the sale of certain premises to satisfy a mechanic's lien, which complainant was held to have upon and against the property to the amount of \$14,924, with legal interest and costs. The decree follows the findings and recommendations of the master in chancery to whom the cause was referred for report on the law and the facts. The chancellor overruled the objections which stood as exceptions to the report.

The complainant seeks to recover upon the quantum meruit. The defense is predicated upon the claim that complainant as contractor prosecuted the work, for which he claims a lien, under the terms of a written contract, which he subsequently abandoned, and that defendant, William J. Conroy, owner of the premises (whose wife is joined as co-defendant), suffered damages in excess of the amount claimed by reason of various breaches of the contract and complainant's failure to complete the work in accordance with its terms.

The primary question therefore is, whether the work for which the lien is claimed was performed under the written contract referred to, or pursuant to an implied contract upon which the claim for a lien is based. It is clear that if the

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NEW YORK . 6 MAY 1946
TOMMIE NELSON

This is an appeal from a decision of the Board of Taxation rendered on January 10, 1936, affirming the assessment made by the Commissioner of Internal Revenue for the year 1934.

The taxpayer claims that the assessment is incorrect because it is based upon a valuation of the property which is not supported by the facts and circumstances. The taxpayer contends that the value of the property at the time of the assessment was \$100,000, whereas the Commissioner has assessed it at \$150,000.

The taxpayer offers the following evidence in support of its claim:

1. A report of an independent appraiser dated March 1, 1935, valuing the property at \$100,000.

2. A statement of the taxpayer's net worth for the year 1934, showing the property as valued at \$100,000.

3. A letter from the local assessor dated February 1, 1935, stating that the property was valued at \$100,000 for the year 1934.

The Commissioner responds that the above evidence is insufficient to establish the taxpayer's claim. He states that the value of the property must be determined on the basis of all the facts and circumstances, and that the independent appraisal and the taxpayer's statement are not conclusive evidence of value.

The Commissioner further states that the local assessor's valuation is not binding upon him, and that he is entitled to make his own determination of value based upon all the information available to him.

In view of the foregoing, the taxpayer requests that the Board reverse the assessment and substitute therefor an assessment based upon a value of \$100,000.

The Board concludes that the taxpayer's evidence is not sufficient to establish its claim, and therefore affirms the assessment made by the Commissioner.

proof does not conform to the latter theory the decree cannot stand, and complainant's remedy, if any, is in a court of law for the amount he claims to be due.

Complainant and one Shebs were partners as building contractors at the time the contractual relation was entered into between the parties hereto. Later, before such relation was terminated, complainant took over and assumed all of the business assets and liabilities of the firm. William J. Conroy is the owner of the premises in question. On May 14, 1934, he entered into a written contract with Berke and Shebs whereby they agreed to erect and construct improvements agreeable to drawings and specifications signed by the parties, for an apartment building containing two stories, and furnish all the labor and materials therefor at the contract price of \$69,425. The contract provided that said sum should be paid out of a first encumbrance upon the premises for \$50,000, and a second encumbrance for the balance of the contract price, and that the contractors were to procure the loans upon certain specified terms, and said loans were to cover payment for all services under the contract, all expenses in procuring the first encumbrance (except the cost of showing title in the owner), attorney's fees connected therewith, the first six months interest on the first loan, and the first year's premium for fire insurance on the building to the extent of \$50,000, the owner agreeing to execute jointly with his wife the necessary trust deeds and promissory notes. The structure was to be completed October 1, 1934.

The arrangements for the loan were left by complainant to his partner Shebs, who made an arrangement for a loan of \$50,000 with one Skurow, and the contractors immediately began excavation. Skurow later, however, declined to perfect the loan unless the provision for the stories was eliminated. Thereupon

new plans were made changing somewhat the "layout" of the apartments and substituting two flats for the stores. A new contract was then entered into between the parties June 24, 1924, which with the exception of such changes in the plans and specifications was identical with the previous contract it displaced.

Although the loan had not yet been perfected the contractors started the foundations about June 25, 1924, and proceeded with the construction of the building in conformity with the revised plans and specifications. While the new contract, following the terms of the previous contract, recited that the plans and specifications were signed, the fact that they were not signed is immaterial so long as both parties recognized the contract as referring to the revised plans and specifications and the construction proceeded in accordance with them.

It appears that by reason of some misunderstanding with Skurov with regard to the payment of commissions on the loan the deal with him fell through, but neither Berke nor Donroy became aware of that fact until July 9, up to which time the construction had gone on apparently in full faith that the loan would be consummated. Further efforts to procure a loan for that amount proved unavailing. We cannot regard the contention that because Donroy undertook to assist the contractors thereafter to procure such loans and urged the construction to go on so that it would be completed October 1, as required by the contract, the contract was in anyway modified or the contractors released from their obligations thereunder.

Paragraph 6 of the contract provided:

"It is expressly understood and agreed that no liability will attach to any of the parties hereto under and by virtue of any of the terms of this agreement, unless and until the said first mortgage has been actually secured."

new plans were made showing numbered the "layers" of the design-
ments and adjusting the lines for the design. A new contract
was then entered into between the parties June 10, 1934, which
with the exception of such changes in the plans and specifications
was identical with the previous contract as disclosed.
It was although the loan had not yet been perfected the con-
tractors started the construction about June 10, 1934, and proceeded
with the construction of the building in conformity with the re-
vised plans and specifications. Within the new contract, following
the terms of the previous contract, recited that the plans and
specifications were signed, and that they were not altered in
material as long as such parties executed the contract and
referring to the revised plans and specifications and the con-
struction proceeded in accordance with them.
It was a fact that by reason of some misunderstanding with
Kroger with regard to the payment of construction on the loan the
loan was not paid through, but neither party nor Kroger became
aware of that fact until July 17, up to which time the construction
had gone on apparently in full faith that the loan would be com-
pleted. Further efforts to procure a loan for that amount
proved unavailing. We cannot regard the construction that had been
done by mistake to be the construction that was intended to be
done and urged the construction to be as we think it would
be completed October 1, as required by the contract. The contract
was in anyway modified on the construction released from their
obligations thereunder.
Paragraph 8 of the contract provided:
"It is expressly understood and agreed that no
liability will attach to any of the parties hereto
under and to either of the terms of this
contract, unless and until the same have been
actually executed."

The fact that the construction proceeded with knowledge of all the parties that the first loan had not been perfected constituted a waiver of this provision, and an estoppel upon either party from enforcing it.

The contractors being thus unable to procure a loan for \$50,000, arranged for one for \$35,000 for which appellant, under protest, executed a mortgage on August 2, 1924, on their assurance that they had the funds to go on with the work and that the difference of \$15,000 not obtained on the first loan would be added to the second. But as the mortgagee refused to allow the contractors to draw on the \$35,000 without they deposited sufficient money to pay for the finishing of the building, the contractors were unable to complete the structure. A little later in that month Sheba dropped out of the firm, as aforesaid, and conferences were had thereafter between Burke and Conroy with reference to financing the project. Burke failing to effect a loan suggested finding a purchaser for the same saying that if he could not sell the building he could not finance it; that he could not get a loan and defendant Conroy would have to finish his own building. He brought two men he had in mind to look at the building but no deal was made. This was in the latter part of August or about the first of September. Complainant then told Conroy that he had better get the roof on himself. They made some ineffectual efforts together to procure a loan. Conroy found that he could not obtain one without putting in additional property as security, but could obtain a loan for \$65,000 by so doing. Complainant advised him to take it saying he was not going to put in any more of his own money, whereupon Conroy said, "All right, there is nothing left for me to do but finish my building," and complainant said, "Yes." Complainant said he had put into the building \$13,450 for which he wanted cash, which Conroy said he could not furnish. After that complainant's

The fact that the construction proceeded with knowledge of all the parties that the first loan had not been properly constituted a waiver of this question, and an acquiescence upon which party

was not to be

The construction being thus made to procure a loan for \$50,000, arranged for one for \$25,000 for which application, under protest, executed a mortgage on August 12, 1888, on their real estate that they had the funds to go on with the work and that the difference of \$25,000 not obtained on the first loan would be added to the mortgage. But on the mortgage returned to allow the mortgagee to draw on the \$25,000 without they deposited and lent money to pay for the balance of the building, the mortgagee was unable to complete the structure. A little later in that month, these things happened out of the time, an agreement, and consequences were had thereafter between Brown and Conroy with reference to

illustrate the project. Brown willing to effect a loan suggested finding a purchaser for the same saying that it he could not sell the building he could not finance it; that he could not get a loan and that Conroy would have to finance his own building. He said that two men he had in mind to look at the building but he did not know. This was the last part of the conversation about the first of September. Conroy then told Conroy that he had better get the rock on himself. They made some architectural efforts together to procure a loan. Conroy found that he could not obtain one

without paying in additional property as security, but could obtain a loan for \$25,000 by so doing. Conroy advised him to take it saying he was not going to put in any more of his own money, whereupon Conroy said, "All right, there is not the left for me to do and I will not do it," and Conroy said, "Yes." Conroy then said he was not going to take the building for which he wanted cash, which Conroy said he could not furnish. Then that Conroy said

company did no further work, but the sub-contractors on the job finished the work for Conroy with his money, which he obtained through a loan to him for \$65,000 on October 8, 1924, secured by a trust deed on said premises and other property.

Various exceptions were taken to the findings of the master but as we view the case it is necessary to consider only two findings upon which the claim for the lien rests. Those findings are (1) that defendant Conroy induced the contractors to commence the erection of said building upon representations and promises that he would negotiate said first loan, and that in reliance upon the same the contractors (and complainant after Chasb's withdrawal) proceeded with the work and contributed the moneys, labor and materials for the improvement of said premises; (2) that the building was not completed on October 1, 1924, because of the failure of defendant, William J. Conroy, to procure or to furnish at the proper time the funds which he had undertaken to obtain for the doing of said work, and (3) that the complainant is entitled to a mechanic's lien.

We have carefully reviewed the evidence and think these findings are unwarranted. We find nothing in the evidence which warrants the conclusion that complainant was ever released from his obligations under the written contract of June 24, 1924. By its terms the contractors expressly agreed to procure the necessary loans for the construction of the building, from which they were to be paid the construction price. The fact that they commenced the building without obtaining the loan they undertook to get and that they were disappointed in their expectations^{of} procuring it, and that in such an emergency Conroy undertook to aid them in procuring a loan did not operate to release them from their agreed undertaking to obtain the same. Complainant and his partner

...any did no further work; but the sub-contractors on the 1st
finished the work for Conroy with his money, which he obtained
through a loan to him for \$25,000 on October 2, 1904, secured by
a trust deed on said premises and other property.
Various exceptions were taken to the findings of the
jury but as we view the case it is necessary to consider only
two findings upon which the claim for the lien rests. These
findings are (1) that defendant Conroy induced the subcontractors
to commence the erection of said building upon representations
and promises that he would negotiate said first loan, and that
in reliance upon the same the subcontractors (and complainant after
their withdrawal) proceeded with the work and completed the
building, labor and materials for the improvement of said premises;
(2) that the building was not completed on October 1, 1904, be-
cause of the failure of defendant, William J. Conroy, to procure
or to furnish at the proper time the funds which he had undertaken
to obtain for the doing of said work, and (3) that the complainant
is entitled to a mechanic's lien.
We have carefully reviewed the evidence and think these
findings are warranted. We find nothing in the evidence which
warrants the conclusion that complainant was ever released from his
obligations under the written contract of June 24, 1904. By the
terms the contract expressly agrees to procure the necessary
funds for the completion of the building, from which they were to
be paid the construction price. The fact that they commenced the
building without obtaining the loan they undertook to get and
that they were disappointed in their expectations is immaterial
and that in such an event Conroy undertook to obtain the
proceeds of a loan the use of which was to be paid from their account
material to obtain the same. Complainant and his partners

evidently proceeded upon their ability to obtain said loans and thereby took the chances of their failure so to do. The evidence tends to show that plaintiff was without ready means to finance the structure and was induced to enter into the contract upon the express agreement of the contractors to furnish such means in the manner indicated in the contract. It is perfectly clear from the testimony that they proceeded on and after the date of the written contract to erect the building according to the plans and specifications as revised, and that when they were unable to procure a loan of \$50,000 they induced Conroy to execute a mortgage for a lesser amount. But his consent so to do amounted merely to a modification of the contract in that respect. (35 Cyc. 127.) It is clear from the evidence that the contractors proceeded under the contract to erect the building, expecting the arrangements made for the \$50,000 loan would be perfected, and that Conroy stood ready and willing at all times to execute the mortgages pursuant to the terms of the contract.

It does not appear, therefore, from the evidence that the failure to complete the building on October 1 was because of the failure of Conroy to procure the funds, but because of the failure of complainant, or his firm, to procure them as he had agreed to do in the contract under which he furnished labor and materials. We find nothing in the evidence that supports either of said findings, and if not the theory of the bill fails and the decree cannot stand. Complainant cannot be permitted to take advantage of a default occasioned by himself and thus avoid his agreement. (Lehman v. Webster, 209 Ill. 264, 268.)

The averments in the bill that Conroy represented to the contractors at the time of making said contract that he would be able to negotiate for and procure a loan in the sum of \$50,000,

...proceeded with their selling to obtain said loans and
they took the chance of their failure to do so. The mis-
take seems to have been mainly one without any reason to
finance the structure and was limited to their into the contract
upon the express agreement of the contractor to finish work
means in the manner indicated in the contract. It is possible
after from the testimony that they proceeded on and after the
date of the written contract to erect the building according to
the plans and specifications as retained, and that when they were
unable to procure a loan of \$50,000 they induced Conroy to execute
a mortgage for a lesser amount. But his consent as to an amended
merely to a modification of the contract in that respect. (25)
(26. 127.) It is clear from the evidence that the contractor
proceeded when the contract to erect the building, expecting the
arrangements made for the \$50,000 loan would be perfected, and
that when it was not, he was forced to execute the mortgage.
It does not appear, therefore, from the evidence that
the failure to complete the building on October 1 was because of
the failure of Conroy to procure the loan, but because of the
failure of complainant, or his firm, to procure them as he had
agreed to do in the contract with which he furnished labor and
materials. He had nothing in the evidence that supports either
of said findings, and it was the theory of the bill that the
defect cannot stand. Complainant cannot be permitted to take
advantage of a defense recognized by himself and thus avoid his
obligations. (Lohman v. Kasper, 200 Ill. 344, 345.)
The evidence in the bill that Conroy represented to
the contractors at the time of making said contract that he would
be able to negotiate for and procure a loan in the sum of \$50,000.

as provided by said contract, and that he undertook and agreed so to do, and directed the contractors to proceed at once with the work of construction pending such negotiations is not supported by the evidence. On the contrary it clearly appears, as aforesaid, that up to July 9 complainant himself supposed the loan had been secured by his partner Sheba.

We regard it as doubtful, to say the least, whether complainant even alleged a statement of facts from which the law will raise an implied promise in his favor. At any rate the proof did not establish the state of facts upon which he relies.

It follows that the court erred in not sustaining the exceptions to the findings aforesaid which would have disposed of the bill and required its dismissal for want of equity.

Accordingly the decree will be reversed with directions to dismiss the bill for want of equity. The denial of the lien, however, will not deprive complainant of the right to recover in a court of law on his contract if anything is due him thereon. (West v. Fleming, 13 Ill. 248; Leontur Bridge Co. v. Standart, 208 Ill. App. 592.)

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scanlan, JJ., concur.

the work of commercial printing and bookbinding is not
to be done, and directed the printer to proceed at once with
the printing of the book. The printer was directed to print
the book in the same manner as the book printed by the printer
in the year 1880, and to print the book in the same manner
as the book printed by the printer in the year 1880, and to
print the book in the same manner as the book printed by the
printer in the year 1880, and to print the book in the same
manner as the book printed by the printer in the year 1880.

THE UNIVERSITY OF CHICAGO PRESS

the work of the Commission on the basis of the fact that the Commission has not yet received the necessary information from the Government of the United States to enable it to make a final decision on the matter. The Commission is, however, of the opinion that the Government of the United States has not yet taken the necessary steps to ensure that the Commission is able to carry out its duties in a timely and effective manner. The Commission is, therefore, of the opinion that the Government of the United States should take the necessary steps to ensure that the Commission is able to carry out its duties in a timely and effective manner.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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WALTER WOLCZEK, by Antonia Wolczek,
as mother and next friend,
Appellee,

APPEAL FROM CIRCUIT

v.

COURT OF COOK COUNTY.

PUBLIC SERVICE COMPANY OF NORTHERN
ILLINOIS, a corporation,
Appellant.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff, a minor, eleven years of age at the time of the accident, the jury returned a verdict in his favor, assessing the damages at \$30,000, on which judgment was entered against the defendant, and appealed from.

There are two counts in the declaration, both of which are predicated upon the theory that at the time of the accident ^{defendant} \angle negligently maintained an attractive nuisance in the form of certain unguarded steel towers supporting uninsulated wires carrying high voltage electricity through a Forest Preserve of Cook County, where children were known to be, which defendant knew, or should have known, were attractive and alluring to children playing about or near them. It is charged that defendant failed to exercise ordinary care to guard and protect said structures and wires so that children of tender years could not climb upon the structures to the dangerous wires rendered accessible by a ladder on the structure.

These steel towers had been erected upon defendant's right of way through a farm of about 137 acres, subsequently

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ALLIED COMPANY, of Chicago, Illinois,
as owner and lessor,
Appellee,

vs.

PUBLIC SERVICE COMPANY OF ILLINOIS,
a corporation,
Appellant.

MR. JAMES J. LEWIS, Attorney General

PRESENTED THE OPINION OF THE COURT.

It is an action for damages for personal injuries sustained
by plaintiff, a minor, eleven years of age at the time of the
accident. The jury returned a verdict in his favor, assessing
damages of \$25,000, an award which was entered against the
defendant, and from

There are two counts in the declaration, both of which
are predicated upon the theory that at the time of the accident
plaintiff was in the hands of the defendant, and that the
defendant was negligent in its conduct. The first count
charges that the defendant, by its negligence, caused plaintiff
to be injured, and that the defendant was liable for the
damages sustained by plaintiff. The second count charges that
the defendant, by its negligence, caused plaintiff to be injured,
and that the defendant was liable for the damages sustained by
plaintiff. The jury returned a verdict in favor of plaintiff,
assessing damages of \$25,000. The defendant appeals from this
verdict, and assigns as grounds for the appeal that the
jury was improperly instructed, that the evidence was
insufficient to support the verdict, and that the damages
assessed were excessive. The court has examined the record,
and is of the opinion that the jury was properly instructed,
that the evidence was sufficient to support the verdict, and
that the damages assessed were not excessive. The appeal is
therefore dismissed.

These facts were not stated upon the record,
and it is not necessary to state them here.

purchased by Geck County for a Forest Preserve. Halsted street on its western boundary furnished its only street frontage, and the only road entering into it was from that street and passed close to the base of the tower in question. One witness said he could reach out and touch it from the road.

This tower was constructed of galvanized V-shaped steel called angle iron. It stood on four uprights or legs imbedded in a cement base which were braced and bolted together at the bottom by horizontal bars about two feet above the cement base. Above these bars the angle irons, called struts, ran diagonally between the legs on each side of the tower at angles of about 45 degrees. These struts were about $4\frac{1}{2}$ feet long and formed a right angle where they were bolted to a leg. The lowest strut started from the horizontal cross piece and joined an upright about 3 feet above it. The distance along the leg between where two struts joined it to where those next above joined it was about 6 feet. There were five of these struts between the ground and a ladder attached to one of the legs. It started about two feet from the upper junction of the fifth strut. It was formed of steps or rungs of iron bars about 18 inches apart, was about 14 feet from the ground or 12 from the horizontal piece, and extended up to the first of three cross arms on which electric wires carrying 12000 volts were strung. Where the wires are attached to the insulator is less than 3 feet from the ladder. The lowest arm was 36 feet from the ground. Plaintiff had climbed along the diagonal struts until he reached the ladder, then on the ladder to the lowest cross arm. While standing there talking and gesticulating to attract the other children, his hand came in contact with one of the wires, from which he received an electric shock, causing him to fall to the

This tower was constructed of galvanized V-shaped steel
enriched angle iron. It stood on four uprights or legs imbedded in
a cement base which were braced and bolted together at the bottom
by horizontal bars about two feet above the cement base. Above
these bars the angle iron, bolted ends, ran diagonally between
the legs on each side of the tower at angles of about 45 degrees.
These struts were about 4 feet long and formed a right angle where
they were bolted to a leg. The lowest strut started less than
horizontal cross piece and joined an upright about 3 feet above it.
The distance along the leg between where two struts joined it was
where these were above joined it was about 3 feet. There were five
of these struts between the ground and a ladder attached to one
of the legs. It started about two feet from the upper junction
of the fifth strut. It was formed of angle or V-shape of iron bars
about 1/2 inch apart, was about 1/2 foot from the ground or 1/2 foot
the horizontal piece, and extended up to the first of these struts
and as which electric wires carrying 11000 volts were strung.
Where the wires are attached to the insulator is less than 3 feet
from the ladder. The lowest one was 2 feet from the ground.
Electricity was obtained along the diagonal between until he reached
the ladder, then on the ladder to the lowest cross arm. While
standing there talking and deciding what to do about the other
children, his hand came in contact with one of the wires. Then
when he received an electric shock, causing him to fall to the

ground and to receive the injuries complained of.

The tower line ran through a strip of timber in the Forest Preserve and there were trees about 30 or 40 feet from the tower and some underbrush near its base. There were playgrounds through the place along the road, the one nearest the tower being about 200 feet east thereof. The Preserve was frequented by children and others for recreation and pleasure. On the occasion in question plaintiff, his younger brother, and a sister about a year older, entered the park by the road in question and joined six other children between the ages of 8 and 13, all girls except one, with whom they engaged in play. On their way out of the Preserve by the road they stopped at the tower in question and began climbing thereon. George Stevenson, a boy about a year older than plaintiff, climbed twice up to the very top. Plaintiff followed him the second time, in the manner above stated, and the girls were climbing on the lower struts. Previous to this the children had been climbing trees in the usual manner and apparently climbed the struts in much the same way they did the leaning tree trunks.

It is argued that the court erred both in denying defendant's motion for a directed verdict and its motion for a new trial, on the ground that the evidence did not tend to support the theory of an attractive nuisance, or, in other words, to prove an invitation to plaintiff or any other child to climb the tower. That the evidence showing the character of the structure, the feasibility of climbing it, its location in a public place where children congregated to play, presented a question of fact rather than of law, whether children of such tender years would be prompted by their natural instincts to climb it, is not debatable. That is an attractive nuisance has frequently been

ground and to receive the injection contained in it.

The lower line was covered by a layer of light in the

forest. There were some small trees and some large trees.

The lower and some underground water. There were also

ground through the place along the road. The one nearest the

lower being about 100 feet from the road. The distance was

measured by children and others for vegetation and distance.

In the distance in question about 100 feet from the road, and a

distance about a year after, entered the park by the road in question

and joined six other children between the ages of 8 and 10, all

with except me, with whom they engaged in play. In their way

one of the children of the road, and the other of the road.

question and began climbing. The distance was about 100 feet.

about a year after, entered the park by the road in question

and joined six other children between the ages of 8 and 10, all

with except me, with whom they engaged in play. In their way

one of the children of the road, and the other of the road.

question and began climbing. The distance was about 100 feet.

about a year after, entered the park by the road in question

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about a year after, entered the park by the road in question

and joined six other children between the ages of 8 and 10, all

held in this state to be a question of fact. (City of Pekin v. McMahon, 154 Ill. 141; Flia v. City of Chicago, 247 Ill. App. 128, 133; Beming v. City of Chicago, 321 Ill. 341; Stadwell v. City of Chicago, 297 Ill. 486.) As said in the Flia case, citing authorities in analogous cases, "unless the facts in the present case are such that all reasonable minds would draw therefrom no other inference * * the question became one of fact for the jury to determine." To our mind there could hardly be a more forceful demonstration of the natural instinct of children to climb, or a more direct invitation to gratify it, than is presented by the facts of this case. Here was a public playground. Previous to climbing the tower the children had been playing "squirrel" in climbing trees to see "who could climb the tree the fastest," and the very sight of the tower, as they came to it, allured them on to gratify that same natural propensity and instinct. As one of them put it: "We walked down the road and when we saw the tower we started to climb it." One of the girls said: "When we got there we saw this here big pole, whatever it is, and we started to have some fun on it. We were climbing up and down * * * four or five of them, something like that, * * * sure I climbed on it, too * * * I climbed about 8 feet, I think, from the ground * * * I climbed on those iron bars there." The evidence shows all of the children, except the three youngest, climbed up and on the lower struts. While plaintiff said the girls climbed as high as the ladder, their testimony does not so indicate. One said she did not, and another said she climbed up to the third strut. While Stevenson said climbing around the bottom "was kind of hard because there was no ladder," plaintiff, a year younger, and one of the girls nine years old at the time, testified that it was "easy climbing." He said it did not take more than three minutes to climb it. That

they could climb it was evidenced by the fact that they did, and the two boys, naturally more venturesome, climbed up the ladder, Stevenson with manifest pride and ambition to the very top to touch the very "peak" of the tower, and plaintiff to the first cross piece where in calling attention to his feat he came in contact with the wire. The allurements to climb such a structure in such a place was obviously as strong to these human "squirrels" as to climb trees there in the playground. And this is demonstrated by the fact that with a common instinct they all began climbing on it at once when they came to it.

They were rightfully on a playground and found there something that loomed up before them as a great plaything, for, as their testimony indicates, they had no adequate comprehension of its practical purpose. The oldest boy said: "I had no idea at all what these towers were there for. I knew there was wires on those towers. * * * I didn't know they were electric wires." And plaintiff, when cross examined on the subject, showed equal ignorance. The tower was not fenced or guarded in any way. It bore no sign of warning or danger. One had been there but had been removed while the tower was being painted and had not been replaced but lay on the ground. There was nothing to indicate a line of demarcation between defendant's right of way and the Public Preserve, which the children in that locality frequented. To them the "pole" was a part of the Preserve and extended to them an invitation "to climb and have fun on it." They were not trespassers, and if technically so on defendant's right of way, the invitation was such as to cast a duty on defendant to guard against its acceptance. He said in City of Pekin v. Monahan, 154 Ill. 141, 147, and repeated in Hansay v. Tenthill Material Co., 295 Ill. 325, 329, both cases of attractive nuisance,

they could think it was a statement by the fact that they did

and the two boys, naturally were, however, situated at the

bottom, however with a number of girls and children at the very

top to reach the very "bank" of the river, and elsewhere

the boys were placed in a sitting position in the boat as

soon in comfort with the river. The statement is also made

statement is such a way as to imply an attempt to show human

"activity" as to claim that there is no playground, and this

is demonstrated by the fact that a common language they all

knows climbing on it as soon as they come to it.

They were naturally as a player and one found that

something that looked up to him as a great plaything, for

at their constant intention, they had no serious conversation

in the general manner. The child boy said, "I had no idea

at all that there were more than two. I think there was also

on these horses. And I didn't know that they were there in a

and finally, now there are about on the one side, showed again

language. The horse was not found to be dead, as they say. In

fact as the of which, or danger. One had been there but had

been moved while the horse was being pushed and had not been

released but lay on the ground. There was nothing to indicate a

line of communication between the two horses, it was not a

single horse, when the children in that locality, the

To show the "line" was a part of the picture and referred to them

an invitation to come and have fun on it. They were not

propaganda, and it was not a sign of a sign of a sign

the invitation was such as to be a sign of a sign of a sign

against the statement, as said in the statement, as said

the statement, as said in the statement, as said in the statement

"Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children."

There is much similarity between the Stedwell case (297 Ill. 488) and the one at bar. There a boy of eleven years and seven months of age climbed up lattice work fastened to the side of one of the iron posts supporting an elevated structure and came in contact with an electric wire at its top. Much the same argument was made there as here that plaintiff was bound to prove that the wire was alluring to childish instincts, and that if anything was attractive it was the structure. The court said that where an attractive thing is so located that in yielding to its allurements a child is brought in direct contact with danger, the person responsible for creating the dangerous condition will be liable.

Counsel for appellant refers to certain cases in this State, and other jurisdictions, readily distinguishable in their facts, which were held not to constitute a case of attractive nuisance. One of them is McDermott v. Burka, 336 Ill. 401. Referring there, however, to the difference of opinion between the courts on this subject, the court proceeded to lay down the doctrine as recognized in this State in the following language:

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby be exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed. Under such circumstances he would have good

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reason to expect that children, from their well known habits and nature, would be attracted to the dangerous thing, and its maintenance would amount to an implied invitation to them, so that they cannot be regarded as voluntary trespassers." (p. 406)

There has been no departure in this State from the doctrine as thus stated. It is, therefore, merely a question of whether the evidence tended to present facts for its application. If it did, as we hold, and as was held by the Supreme Court in kindred cases above cited, it was a question for the jury to determine whether the device was an attractive nuisance, and we are not disposed to hold that the evidence was insufficient to sustain the cause of action. On the contrary we think it makes out a clear case of attractive nuisance as defined by our Supreme Court, regardless of what may be the rulings in other jurisdictions relied on by appellant.

Appellant cites from Martin v. Public Service Co., 299 Ill. 112, where the court said a boy fourteen years old, raised in a city, knows as well as a man that insulated wires carried upon poles are likely to be charged with a deadly load of electricity. But this certainly cannot be said either as a matter of fact or of law of a boy three years younger. The obvious difference in intelligence, education, mental and physical development between a boy fourteen and one eleven years of age is so well known as not to call for comment. To apply such a rule to a child of such tender years is to ignore the settled law, on which the jury was instructed in this case and which is not complained of, that a boy of such an age is only required to exercise that degree of care and caution that a boy of his age, intelligence, capacity and experience would exercise under the same circumstances. If such a rule may be applied to a boy eleven years old it is difficult to say where the line should be drawn between fact and law as to those younger. Such a rule was not

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known habits and names, would be expected to the
language thing, and the witnesses would know
be an English invitation to them, as that they
cannot be regarded as voluntary statements." (p. 100)

There has been no objection in this Court from the
prosecution as thus stated. It is, therefore, merely a question of
whether the evidence tended to prove facts for the jury to
It is said, as we hold, and as was held by the Supreme Court in
kindred cases above cited, it was a question for the jury to
determine whether the device was an effective witness, and we
are not disposed to hold that the witness was insufficient to
sustain the case of action. On the contrary we think it makes
out a clear case of contributive negligence as defined by our Supreme
Court, regardless of what may be the rulings in other juris-
dictions relied on by appellant.

Appellant cites from Wright v. People (1892), 111 Ill. 112, where the court held a boy thirteen years old, raised
in a city, liable as well as a man that invaded wires carried
upon poles and likely to be charged with a deadly load of
electricity. But this certainly cannot be said either as a matter
of fact or of law of a boy thirteen years (under). The doctrine
of negligence in intelligence, education, mental and physical
development between a boy thirteen and one eleven years of age
is so well known as not to call for comment. To apply such a rule
to a child of such tender years is to ignore the natural law, and
which the jury was instructed in this case and which is not
contested at, that a boy of such an age is only entitled to
exercise that degree of care and caution that a boy of his age,
intelligence, capacity and experience would exercise under the
same circumstances. It was a rule that the jury should be given
years old it is difficult to say where the line should be drawn
between fact and law as to cases younger. When a rule was not

applied in the Stedwell case, supra, where the boy was seven months older than plaintiff, and where it was held there was no error of law that would justify a reversal of the judgment. And where, as here, the evidence, brought out by defendant itself, affirmatively shows that the boy possessed no such knowledge of electricity, defendant is in no position to urge that the question of ordinary care or contributory negligence was one of law. The Austin case, supra, not only dealt with a boy fourteen years old, when many children leave high school, but it was not an attractive nuisance case raising a question of allurement, and merely presented a question whether on undisputed evidence the boy exercised ordinary care as a matter of law. There, too, it was also held that the boy in walking on the top of a bridge structure on a timber fourteen inches wide had no business there. Here, however, the case is one of an attractive nuisance, and as said in the Stedwell case, supra, a like case, the boy in using the structure in play was not a trespasser as to the defendant and so far as defendant was concerned "was rightfully on the pillar." (p. 490) In the Austin case, supra, the boy apparently voluntarily grabbed hold of the wire. Here he was allured to the spot and touched it accidentally. There the question was deemed one of law on undisputed facts from which all reasonable minds would agree that the boy was negligent. To so hold here where the boy was only eleven years old would be going into the teeth of unbroken precedent to the contrary. Unquestionably both on the question of allurement and the boy's exercise of ordinary care for one of his age, etc., the facts were properly presented to the jury.

Nor need defendant have had knowledge of the fact, as disclosed by the evidence, that children had been previously seen to climb upon the tower. It is enough, as stated in the Hebermott case, supra, "if the conditions are such that the owner may reason-

applied in the Wheeler case. There the boy was seven months older than plaintiff, and there it was held there was no error of law that would justify a reversal of the judgment. And, where, as here, the evidence, brought out by defendant itself, affirmatively shows that the boy possessed no real knowledge of electricity, defendant is in no position to urge that the question of ordinary care or contributory negligence was one of law. The Wheeler case, again, not only deals with a boy fourteen years old, when many children have high school, but it was not an affirmative decision as to a question of affirmative defense, and merely presented a question whether or not defendant's evidence was sufficient to make out a matter of law. There, too, it was also held that the boy is entitled on the fact of a single witness on a witness fourteen years old had no business there. Here, however, the case is one of an affirmative defense, and as held in the Wheeler case, Wheeler is like Wheeler, the boy in making the defense in play was not a trespasser on the defendant's land and no defense was presented as to the defendant and no defense was presented as to the defendant on the other. (p. 400) In the Wheeler case, again, the boy apparently voluntarily crossed into the yard. Here he was allowed to the spot and certainly it could not be held that the question was deemed one of law on which the fact that all reasonable minds would agree that the boy was negligent. To be held here where the boy was only eleven years old would be to bring into the area of improper procedure to the contrary. The question is then on the question of affirmative defense and the boy's exercise of ordinary care for one of his age, etc. The facts were properly presented to the jury.

For more defendant have had knowledge of the facts as stated by the evidence, this children had been previously told to climb upon the fence. It is enough as stated in the Wheeler case, again, that the defendant is such that the matter was

ably anticipate" they would, knowing the danger to which they would be exposed in so doing. And that appellant did so anticipate may well be inferred from the fact of placing the sign of warning thereon that had been removed. But it is not a question whether defendant did anticipate such danger but whether, under all the circumstances, especially after the place became a public playground, it should have anticipated it. That the conditions were such as to warrant the jury in holding that it should, we cannot doubt.

One of defendant's witnesses testified that it was possible but not practicable to insulate the wires. Like testimony was given, but ineffective, in the Stedwell case, supra. But it is not necessary to discuss whether the sole negligence of defendant consisted in not insulating them. Surely there are other devices for preventing children from reaching them. An obvious one was a fencing of the base.

Counsel has cited cases on the doctrine of attractive nuisance from other jurisdictions, some with wholly dissimilar facts, as, for instance, telegraph pole cases where the wires were carried on naked poles, and other cases where the doctrine of the Turntable Cases has been much more restricted in its application than by our own Supreme Court, which, of course, we must follow where the decisions conflict. We might agree with the conclusion as to the facts in some of these cases but not with reasoning upon the application of the doctrine not in harmony with the decisions in our own State. Three so-called tower cases are particularly relied upon. W. T. & W. H. & H. R. E. Co. v. Fruchter, 260 U. S. 141; Brown v. American Mfg. Co., 305 N. Y. ^{3.} 331; Bonniwell v. Milwaukee L. E. & T. Co., 174 Wis. 1. In the former case a boy climbed to the top girder of a steel truss bridge at the end of which were two upright steel lattice towers supporting wires carrying an electric current, and reached for a bird on one of the

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

There are two main reasons why the Commission is not in a position to make a final decision on the matter. The first is that the Commission has not yet received all the information it needs to make a decision. The second is that the Commission is not yet in a position to make a decision on the matter.

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wires. The court deemed the evidence insufficient to constitute an invitation for the boy to climb to the point from which he could touch the bare wire, citing the law on the subject as laid down in United Rine Co. v. Britt, 358 U. S. 268, 273, where the court's statement of the doctrine is manifestly not in accord with the decisions of this State, above cited. In the latter case some children went on some private property to a pond that contained poisoned water from which they died. Three of the Justices, however, including Chief Justice Taft, were averse to disturbing the jury's findings of fact, and dissented from the opinion, citing City of Pekin v. McMahon, 134 Ill. 141, and regarded the decision as in conflict with previous views of that court. In the Britt case the court said: "The principle if accepted must be very cautiously applied," thus indicating a tendency to a greater restriction of the application of the principle than disclosed in the decisions of this State.

In the Brown case, supra, the defendant's electric wires were strung on a 30-foot tower on its own land in a yard of tenement houses in which children played. The court there said that the tower was so constructed, and the wires strung at such a height that one would not anticipate that immature children would climb up and reach the wires. While in this State such a question of fact would be left to the jury the court there said what may well distinguish the case from the one at bar: "Cases involving structures in public places are not parallel to this case."

In the Benniwell case, supra, 174 Wis. 1, the court, quoting from a previous decision in that State, said that the doctrine of the Turntable Cases, or of attractive nuisances, had not been applied in that State to the conduct of ordinary business carried on in a customary manner, and it would not

apply it to the facts of that case, asserting it to be the modern tendency toward a restriction rather than an extension of the doctrine.

Without further analysis of the cases cited by appellant from other jurisdictions it is sufficient to say that they either do not recognize the doctrine of attractive nuisance as applied in this State, or present a wholly dissimilar state of facts.

As to the damages assessed, they are large. But we cannot say in the light of the reduced purchasing value of the dollar, and the limitations and handicap the injuries have placed on the boy for the rest of his life, that they are excessive. Two amputations of his right arm, leaving a stump of about two inches, became necessary in consequence of the accident and ensuing gangrene. He was severely burned about the heart and chest and on the bottoms of his feet. We need not go into the full details of his sufferings or his injuries. Evidence sufficient to base the jury's findings tended to show as permanent effects of the injury not only the loss of his right arm but a dilatation of the heart, restriction to the expansion of his chest by scarred tissue over the heart so as to interfere with his breathing and with the free use of his remaining arm, so that the boy will be seriously handicapped to do much, if any, work as long as he lives.

Nor do we think there was reversible error in remarks of counsel for plaintiff. One of them was a statement to the effect that when a person creates a structure which is attractive to children and maintains upon it something that might injure them then it is his duty to guard and protect that thing from the child. Appellant's counsel objected to it as an incorrect statement of the law. But while not a complete statement of it we do not think it affords ground for reversal.

apply it to the facts of this case. It is to be the modern
tendency toward a restriction rather than an extension of the

Without further analysis of the cases cited by applicant
from other jurisdictions it is sufficient to say that they either
do not recognize the doctrine of restrictive licenses as applied in

this State, or present a wholly dissimilar state of facts.

As to the damages awarded, they are large. But we

cannot say in the light of the various preceding cases of the

State, and the limitation and hardship the injuries have placed

on the boy for the rest of his life, that they are excessive.

The magnitude of his rights, leaving a group of about two

hundred, seems so nearly in consonance of the accident and

causing damages. He was severely burned about the head and

chest and on the bottom of his foot. A scar not so large as the

full details of his sufferings or his injuries. Witnesses testify

to have the jury's findings tended to show no permanent effects

of the injury not only the loss of his right arm but a disfigurement

of his heart, restriction of the motion of his chest by scarred

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with the use of his remaining arm, so that the boy will be

permanently handicapped to be much, if any, work as long as he

lives.

Let us now think there was considerable error in testimony

of counsel for plaintiff. One of them was a statement to the

effect that when a person receives a fracture which is restrictive

to children and maturing upon it some thing that might injure them

then it is his duty to guard and protect them from the injury.

Applicant's counsel objected to it as an incorrect statement of the

law. But while not a complete statement of it we do not think

it entirely correct for reversal.

In the other remark complained of counsel compared the danger of the unguarded tower carrying its high voltage electricity to that of a rattlesnake in its deadliness, and when it was objected to he expressly disclaimed either in language or in intention to compare defendant to a rattlesnake, as opposing counsel sought to twist its meaning. While the comparison or illustration was more or less inapt, we do not think it could be regarded as an appeal to the passion and prejudice of the jury, or that it had that effect. We are not unmindful of the effect of inflammatory appeals to passion and prejudice in this class of cases, and we also recognize a growing tendency of defeated counsel to seize upon any expression in argument that can be given such a coloring. But reversal on such grounds is seldom made, and occurs only in extreme cases where the appeal was manifest and calculated to arouse passion or prejudice. Illustration in argument is not improper and an advocate is not limited to a mere recitation of his theory of the evidence. It is now, and always has been, a recognized province of the advocate to enforce its significance by illustration and rhetorical adornment and counsel will not be circumscribed within too narrow limits. (Schintz v. People, 178 Ill. 320; Bonnelly v. Chicago City Ry. Co., 235 Ill. 35.)

We have carefully considered counsel's other contentions that the court erred in admitting and excluding evidence and in giving instructions, and as we deem none of them sufficiently well founded to justify a reversal we will refrain from detailed discussion of them.

A hypothetical question complained of was finally

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framed to meet most of the specific objections to it, and thus presented, in our opinion, the material hypothetical facts founded on the evidence. The other admitted evidence complained of was relatively inconsequential, and the excluded evidence manifestly incompetent.

Instruction No. 1 on the preponderance of evidence, though held good in many prior cases, has recently been condemned in Teter v. Spooner, 305 Ill. 193, and in Reinta v. Chicago Rapid Transit Co., 327 Ill. 210, but without reversing the judgment. But the rule as to what plaintiff had to prove by the preponderance of evidence was so clearly stated in two of defendant's instructions to the jury they could not, taking the instructions as a series as they should, have been misled or confused by the criticised instruction. Criticism of other given instructions present more or less "hair splitting" distinctions that no jury in all probability would discover, and which we deem unnecessary to discuss.

Finding no reversible error in the case we affirm the judgment.

AFFIRMED.

Scanlan, J., concurs;

Gridley, J., dissents.

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MR. JUSTICE CHIDLEY DISSENTING.

I am unable to agree with some of the holdings in the majority opinion, or the affirmance of the judgment.

Both counts of plaintiff's declaration are predicated upon the theory that defendant negligently maintained an attractive nuisance (viz., an unguarded steel tower, with others, supporting near their tops wires charged with a dangerous voltage of electricity) upon its own right of way within a Forest Preserve or park, frequented by the public for pleasure and recreation. In the first count it is averred that the particular tower had a ladder thereon running from near the ground to near the top; that plaintiff and other children were playing within the preserve or park; that the structure was alluring to children and of such a character that "defendant should have known that children would be attracted thereto and climb upon the structure and ladder up to the wires;" that it was defendant's duty to use ordinary care to guard and protect the structure and wires, etc.; that defendant, failing in its duty, negligently maintained them so that the wires were "easily accessible" to children from the ground, and negligently failed to guard and protect them so that plaintiff, "who knew nothing of the danger in so doing," climbed up the structure and ladder and, using such care and caution as could reasonably be expected of a boy of his age, intelligence and experience, came in contact with the wires, and was shocked, burned and permanently injured. In the second count the averments are similar and there is an additional averment to the effect that defendant negligently failed to insulate the wires near where they were attached to the cross-arms of the tower.

The evidence discloses that in 1918 defendant purchased

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from the owner of a farm south of the city of Chicago a right of way, 100 feet wide, through the farm for its electric power line, and thereafter erected in said right of way several towers, including the one in question, about 120 feet apart; that the power line ran from defendant's Station No. 4, in Blue Island, Illinois, towards Chicago in a northeasterly direction; that in 1921 or 1922 the farm, containing about 137 acres but excepting defendant's right of way, was purchased by Cook county for a forest preserve or park; that the western boundary of the preserve was Halsted street, its northern boundary the Calumet river and its southern boundary was near 136th street, an east and west street; that no part of the preserve fronted on any street except Halsted; that the first tower within the preserve was erected near the river and the accident happened at the next tower southwest therefrom on the afternoon of May 1, 1925; that there was a bridge over the river, and running southerly therefrom was a narrow dirt road, used as an entrance to and exit from the preserve; that this road passed within a few feet of the tower in question, and, continuing on, ended at Halsted street, affording, also, access into the preserve from Halsted street; that defendant's right of way was not fenced and never had been, and there was nothing, except the towers and wires, to distinguish it from the land of the preserve, parts of which were open land and parts wooded; that the tower was in a wooded portion, with shrubbery around its base, and about 200 feet from it was a place cleared for picnics, with benches, etc., used at times by the public; and that nearby there were other open spaces where children came and played various games.

The character of construction of the tower is set forth in the majority opinion. The so-called "ladder" commenced about 14 feet from the ground, and the wires on the lowest cross-arm

were 36 feet from the ground. The four steel uprights, as well as the steel struts extending between them diagonally, were "v" shaped, and the sharp edge of the apex of each strut was upward and inward, making the climbing of the tower before the ladder was reached, exceedingly difficult. Plaintiff's witness, George Stevenson, 13 years old, who climbed the tower before plaintiff did, and who was about 2 years older, testified that climbing on the lower part of the tower was "kind of hard," that "we climbed up on the irons," and that "we did not step from one iron to another but used our feet and hands in climbing."

The only testimony introduced by plaintiff, tending to show that prior to the accident children had been attracted to any of the towers in the preserve and had climbed thereon, was that of the witness, Little, a caretaker in the preserve. On direct examination he testified that he had seen children "climbing on the towers and playing around in their vicinity," but on cross-examination he testified: "These children that I saw were playing and climbing around the lower parts of the towers; I never saw anyone climbing up as high as the ladder; they were just climbing around the bottom support; I never called the attention of anybody connected with the Public Service Company to the fact that children were playing around these towers." E. F. Harms, defendant's witness and head of its claim department to which all claims for injuries come, was not allowed to testify that neither he nor the department had ever received, prior to the accident, any notice that children had attempted to climb any of the towers or had been injured on or around them. Being asked whether it was possible to insulate the wires near the towers, he replied that it was, but that it was not practicable to do so from an engineering standpoint; that to properly do so

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there would have to be a covering of some material and then in addition a lead covering or tube to keep water out; that such an insulation at times, especially during a sleet storm, because of the increased weight on the wires, would be very likely to break them and cause them to fall; and that no wires, suspended on poles or towers and used by companies in transmitting electricity of high voltage over various parts of the State, are thus insulated.

At the close of plaintiff's case defendant moved for a directed verdict in its favor but the motion was denied. Defendant also moved that the jury be instructed to disregard each of the counts of the declaration, but the motions were denied. Those motions were renewed at the close of all the evidence and again denied. After verdict defendant's motion for a new trial was denied.

Considering all the facts and circumstances in evidence, the writer does not think that defendant failed in any duty it owed to the public, or to children especially, in maintaining the tower in question and the other similar towers in the manner it did, or that, in so maintaining the tower, it was guilty of any actionable negligence, even upon the "attractive nuisance" theory. In the majority opinion in United Mine Co. v. Britt, 228 U. S. 263, 273, it is said:

"Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied."

In the case of New York, etc. R. Co. v. Fruchter, 260

There would have to be a showing of some material and then in addition a lead covering or cover to keep water out; that such an insulation as timber, especially during a cold season, because of the increased weight on the wires, would be very likely to break them and cause them to fall; and that no wires, suspended on poles or towers and used by companies in transmitting electricity at high voltage over long distances of the wires, are insulated. At the close of plaintiff's case defendant moved for a directed verdict in its favor but the motion was denied. Defendant also moved that the jury be instructed to disregard each of the points of the testimony, that the motions were denied. These motions were overruled at the close of all the testimony and again denied. After reading defendant's motion for a new trial was denied. Considering all the facts and circumstances in evidence, the writer does not think that defendant failed in any way to meet its burden, or to establish its liability, or to establish the cause in question and the other similar causes in the manner it did, or that, in no other way the lower, it was guilty of any systematic negligence, even upon the "statutory minimum" theory. In the majority opinion in *United States v. ...*

United States v. ... 278, 12 in 1911.

"Plaintiff has no burden to show that its people's land was taken, and the more fact that they are taking land from us they upon whom so much of their and property for their safety. On the other hand, the duty of one who invites another to his land and to take him into a trap is well settled, and while it is in very plain that a man is liable, it may be held that merely to receive and expose, without being asked to do so, is not liable. A duty as a mechanical one is a duty, however, that is certain to attract them, and the legal effect of an invitation to them although not to an adult. The principle is that a person must be very cautiously applied."

U. S. 141, a boy of 8 years, by climbing to the topmost girder of a municipal bridge (used for conveying a street across a railroad) and thence up a latticed tower, touched a live electric wire about 30 feet above the street and was injured. Judgments in his and his father's favor, rendered in the District Court, had been affirmed by the Circuit Court of Appeals, but the Supreme Court reversed them, holding that, under the circumstances stated in the unanimous opinion, the railroad company (which maintained the wires and the bridge framework) could not be deemed liable upon the theory of license or invitation. Some of these circumstances were that the bridge was formed of posts, beams, girders, etc., connected and strengthened by trellis or lattice work; that the top girders or beams were 23 feet above the street; that fastened to the top girder at the end of the bridge were two upright steel lattice towers, posts or struts; that cross-arms attached to these, 6 feet above their bases, supported bare wires carrying electric current used for operating trains; that the nearest wire was 17 inches from the strut; that with considerable difficulty and some danger active boys could climb to the highest parts of the bridge; that boys often climbed upon it, and some reached the struts; that when doing so they were frequently chased away by a policeman and railroad guard; that at each corner of the bridge there was a notice-board displaying the words "Live wires, Danger, Keep Off"; that after the boy, by using the trellis work, had climbed from the street to the top of the bridge in quest of a bird's nest, he saw a bird on the wire above and, to catch it, climbed up the strut, reached out and, his hand touching the wire, he suffered severe injuries; and that the evidence left it in doubt whether he was able to read the warning words upon the

notice boards. It is stated in the opinion (p. 144) that "the

court below accepted the theory that the jury could have found the structure was well known to be both dangerous and attractive to children and that failure to supply proper guards, human or mechanical, constituted negligence," within the doctrine of two named cases previously decided by the Supreme Court. But, after referring to the decision in the Britt case, supra, and using the above quotation therefrom, the opinion concludes (p. 145):

"Considering the peculiar circumstances of the present cause, it is clear that if the plaintiff had been an adult he could not recover; and we are unable to find any sufficient evidence from which the jury could have properly concluded that the railroad company either directly or by implication invited or licensed him to climb upon the strut to a point from which he could touch the bare wire thirty feet above the street. The motion for an instructed verdict should have been granted."

In Brown v. American Mfg. Co., 205 N. Y. Supp. 331, it appears that plaintiff, as administratrix of the estate of Herman Brown (a boy about 14 years of age at the time of his death) obtained a verdict and judgment in the trial court against defendant for the negligent killing of the boy. On appeal to the appellate division of a supreme court of New York it was ordered that the judgment be reversed on the law and that the complaint be dismissed. The opinion discloses that the boy was killed by coming in contact with high-tension electric wires belonging to defendant and extending from its power plant to its manufacturing plant; that upon its own property defendant had erected a steel tower, 30 feet high, at the top of which the wires were strung; that the tower was a tripod, and extending between the uprights or legs were horizontal strips of steel, the lowest of which was about 6 feet above the top of the concrete base of the tower; that there were also diagonal pieces or braces, crossing at the centers, the lowest of which rested upon said base; that upon one of the legs were pegs, or foot rests, for climbing, but the lowest of the pegs was 10 or 11 feet from the top of the base; that no

part of the tower was charged with electricity; that the boy had climbed to the top of the tower and there came in contact with the wires or wire; that the tower was erected in the yard of tenement houses and children of the tenants were accustomed to play in the yard; that upon one occasion two boys or young man, visiting one of the tenants, had climbed the tower to the fourth cross-piece or horizontal and there had their pictures taken; that two children said that they at times had seen children climb on the tower, but that on no occasion had they gone as high as did the boys who had their picture taken; and that there was no proof that children frequently climbed upon any part of the tower. Among the holdings of the reviewing court are, that defendant was within the exercise of its legal right when it erected the tower upon its own premises; that the tenants had the right to be upon the premises near or about the base of the tower, but that "when they went upon the tower they became trespassers;" that, had the injured person been an adult, he would have had the right of a trespasser only, and defendant would not have been called upon to protect him against dangers existing in the tower; and that the deceased was likewise a trespasser, and as to him as such the owner had disregarded no duty. The opinion then makes mention of the claim of the plaintiff, viz., that the tower was an enticement and a lure to the boy, that it was of a like effect to him as an invitation to an adult, that he could not appreciate the danger from contact with the highly charged wires, and that a duty rested upon defendant to protect him against injury by such contact. In discussing this claim and deciding it adversely to plaintiff, the Court said (p. 333):

"The defendant owed no duty to watch and inspect the tower to protect climbing children. Under the circumstances, no knowledge may be fixed upon the

defendant by implication of law. The tower was so constructed, and the wires strung at such a height, that one would not anticipate that immature children would climb it and reach the wires. There is no proof that the defendant knew children did climb the tower. The proof does not show such frequency of climbing as would justify a finding of knowledge thereof in the defendant by implication of fact. * * and there is no proof that at any time any child had climbed the tower, except in its lower parts; no proof that any child had before gone near the wires.

Cases involving structures in public places are not parallel to this case. We do not think that the evidence discloses that this defendant failed in any duty which it owed to the deceased. The child was a licensee upon the premises, but he was a trespasser when he went upon the tower. The defendant was engaged upon its own land in simply doing that which was necessary in carrying on its business properly, and negligence may not be imputed to it, because it failed to exercise the highest vigilance to hinder children from doing that which it had no reasonable ground to anticipate they would attempt to do. There is an absence of any proof upon which a jury could be permitted to find negligence."

While the writer is aware of the fact that the decisions of our Supreme Court in "attractive nuisance" cases have been, as said in McBermott v. Burke, 236 Ill. 401, 406, "most liberal to children," he is impressed with the reasonings and holdings in the above mentioned cases and their peculiar applicability to the present case. And the cases of Sheffield v. Horton, 161 Ala. 153, 167, Mayfield Water & Light Co. v. Webb's Adm'r., 129 Ky. 395, 401, and Simonton v. Citizens' Electric Light & Power Co., 67 S. W. Rep., Texas App., 530, 532, may, with propriety, also be cited.

And the writer is also of the opinion, under all the facts and circumstances in evidence, that plaintiff was guilty of such contributory negligence as bars a recovery by him. He lived in Chicago and attended a parochial school. Apparently he knew that wires carried upon poles or towers were charged with a dangerous current of electricity. While he testified on direct examination that he "did not know the tower was dangerous," and "did not know anything about electricity or electric wires," on cross-examination he testified that he had ridden on street cars many times before

the accident, knew what is meant by a trolley wire, and had "seen sparks flying from trolley wires at times when a street car runs along a street." From the shock and burns he received and from his fall to the ground from a height of more than 30 feet, he was rendered unconscious but soon recovered his senses. According to the testimony of his sister, she and Stevenson assisted him to walk away from the place of the accident, and when they had almost reached Halsted street by the dirt road, she said to plaintiff that he had gotten an electric shock and he replied "Yes". In Austin v. Public Service Co., 200 Ill. 112, a boy nearly 14 years of age was killed by coming in contact with heavily charged electric wires while attempting to walk over the top of a bridge on a beam about 14 inches wide and about 34 feet above a river for the purpose of getting a bird's nest. The administrator of his estate recovered a judgment against the Service Co. in the trial court and the judgment was affirmed by the Appellate Court for the Second District. The case reached the Supreme Court on certiorari, and, in reversing the judgments, the Court said (p. 131):

"A boy fourteen years old, who has been raised in a city, knows as well as a man that insulated wires carried upon poles are likely to be charged with a deadly load of electricity and that it is not safe to touch them or go where he is likely to fall into them. Whether deceased voluntarily touched these wires or involuntarily seized them in an effort to save himself from falling into the river can make no difference, because it was his own negligence that placed him in this place of danger. Deceased had no business on top of this bridge, and no person exercising due care would have been there. * * The trial court erred in refusing to direct a verdict of not guilty."

And in this connection reference may be made to the case of Bonnievell v. Milwaukee, etc. Co., 174 Wis. 1, wherein it appears that a boy, 11 years of age, met his death, after climbing a tower carrying electric wires, by coming in contact with a highly charged wire strung on a pole near the tower. The judgment which had been recovered against the company by the administrator of the boy's

[illegible]

estate, was reversed by the reviewing court upon two grounds.

(1) that the company was not bound to anticipate that a child or children would climb upon the tower in such a manner as to be endangered by its wires, and (2) that the boy was guilty of contributory negligence as a matter of law.

The writer also is of the opinion, if it be considered by the Supreme Court on application for certiorari that he is wrong in his views as above expressed, that the present judgment must be reversed because plaintiff's attorney in his argument to the jury made improper remarks, which tended to inflame the passions and prejudices of the jury and probably accounted for the amount of the large verdict of \$35,000. In the argument, after stating that the structure was attractive to children, that it was inherently a thing that children would climb upon, that at its top was a deadly current of electricity, and that the structure was planted right in the middle of a forest preserve, dedicated as a play place for children and a recreation place for everybody, plaintiff's attorney said:

"Right in the middle of this recreation place was this deadly thing that could kill or maim in the twinkling of an eye. Now, how long do you have to consider the questions, whether or not that was an allurement to children, whether or not it was dangerous, and whether or not it was guarded or protected as it should have been? You don't have to spend a second, do you? And, if you don't, why, then, the answer to this case is plain and clear and definite. * * It is just as clear as though I had taken a rattlesnake out there into the forest preserve and turned it loose in the midst of a lot of boys who were playing ball in the forest preserve; and I would be no more culpable there than this company was then."

Thereupon defendant's attorney objected to the statement and to the comparing of the defendant company to a rattlesnake. Upon plaintiff's attorney stating that he was not doing so, the court without comment overruled the objection. And thereupon plaintiff's attorney continued:

entirely was covered by the following words: "The following is a summary of the results of the investigation conducted by the author in the field of the subject of the investigation." The author also in the opinion, it is to be noted by the Supreme Court on application for certiorari, that in the view of the above expressed, that the present judgment must be reversed because plaintiff's remedy in this regard is the only one known to the law, which is to be followed in the future. The court of the United States in the case of the plaintiff, it is to be noted, after stating that the plaintiff was entitled to relief, that it was necessary to find that plaintiff was entitled to relief, and that the remedy was granted in the case of a former plaintiff, and that the plaintiff was entitled to relief in the case of a former plaintiff.

The court of the United States in the case of the plaintiff, it is to be noted, after stating that the plaintiff was entitled to relief, that it was necessary to find that plaintiff was entitled to relief, and that the remedy was granted in the case of a former plaintiff, and that the plaintiff was entitled to relief in the case of a former plaintiff.

The court of the United States in the case of the plaintiff, it is to be noted, after stating that the plaintiff was entitled to relief, that it was necessary to find that plaintiff was entitled to relief, and that the remedy was granted in the case of a former plaintiff, and that the plaintiff was entitled to relief in the case of a former plaintiff.

"I am not comparing this company to a rattlesnake. I am simply making the comparison as to danger. A rattlesnake is only an evidence, is only a dangerous instrumentality, and I am likening it to any dangerous instrumentality that is set down where children are. I say nothing against this Public Service Corporation except that they were negligent."

Somewhat similar remarks were held prejudicial and ground for reversal in the case of Chicago Union Traction Co. v. Lauth, 216 Ill. 179, 183-4.

1. Содержание

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

VICTORIA EASTMAN,
Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

v.

JAMES GAVIN,
Appellant.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$9000 in a personal injury suit arising from a right-angle collision in a street intersection.

Reversal is sought on the grounds that (1) the weight of the evidence is against the theory of defendant's negligence and plaintiff's want of contributory negligence; and (2) that the jury was erroneously instructed.

Plaintiff was riding in a two-seated touring car, which her sister, Polly Brown, was driving west on Peterson road. Defendant's motor hearse was being driven south in Western avenue. Each party had a clear and unobstructed view of the other street. It is conceded that the collision took place west of the center of the intersection, and defendant testified, a little south of it.

The testimony of plaintiff and her sister was to the effect that the Brown car slowed down to a speed of eight miles an hour when within about eight feet from Western avenue, and that defendant's car was then from half a block to a block north of the crossing; that their car continued across the intersection at about ten miles an hour when defendant's car was seen and heard

COURT, COOK COUNTY.

IN SENATE,
JANUARY 1, 1910.

THE STATE OF ILLINOIS,
PLAINTIFF IN ERROR,
V.
JOHN J. HANCOCK,
DEFENDANT.

This is an appeal from a judgment for \$2000 in a personal injury suit arising from a right-angle collision in a street intersection.

Reversed is sought on the grounds that (1) the weight of the evidence is against the theory of defendant's negligence; and (2) that the jury was erroneously instructed.

Plaintiff was riding in a two-wheeled touring car,

which was started, John Hancock, was driving west on Jackson

road. Defendant's motor vehicle was being driven south in

western avenue. Each party had a clear and unobstructed view

of the other street. It is conceded that the collision took

place west of the corner of the intersection, and defendant

testified, a little south of it.

The testimony of plaintiff and her sister was to the

effect that the green car slowed down to a speed of eight miles

an hour when within about eight feet from eastern avenue, and

that defendant's car was then from half a block to a block north

of the crossing; that when the collision occurred the information

at about ten miles an hour when defendant's car was seen and heard

to be coming on at great speed, which they could not estimate, whereupon Miss Brown "stepped on the gas" to escape what seemed to be an inevitable collision.

Defendant testified that when his hearse was about 75 to 100 feet north of Peterson road he looked to the west, but though there was a clear unobstructed view to the east of said road he did not see, or look to see, the other car until he was within fifteen feet of the road, when he put on the emergency brake to avoid collision with the other car which had then reached about the center of the intersection. He admitted, however, later on in his testimony that he had testified at a previous trial that he was from 50 to 100 feet away when he saw the other car in the intersection, stating that his answer was so "then and it is now." He also testified that the Brown car was crossing the intersection at the rate of 20 miles an hour.

Under either state of facts we think the jury were justified in holding from his own testimony that defendant was negligent. If he was 50 to 100 feet away when the other car was already in the intersection, traveling at such a rate of speed as he testified to, he certainly had no right to push ahead and try to avail himself of the right of way under such circumstances. (Salmon v. Wilson, 227 Ill. App. 296; Heidler Hardwood Lumber Co. v. Wilson & Bennett Co., 243 Ill. App. 89; Fisher v. Johnson, 248 Ill. App. 23; Marling & Co. v. Yellow Cab Co., 238 Ill. App. 326.) If he was only fifteen feet away and the other car was then close to the center of the intersection, as he testified, a distance of about 45 feet from him, according to his own testimony, and he was going, as he testified, at about 15 miles an hour and could stop his car at that rate of speed within 10 or 12 feet, there would seemingly have been no

to be coming on a green signal, which they could not see. When they saw the green signal, they stopped on the green, to avoid what seemed to be an inevitable collision.

Defendant testified that when his car was about 70

to 100 feet north of Peterson road he looked to the west, and through there was a clear unobstructed view to the east of said road he did not see, or look to see, the other car until he was within fifteen feet of the road, when he got on the emergency

brake to avoid collision with the other car which had then reached about the center of the intersection. He admitted,

however, later on in his testimony that he had testified at a previous trial that he was from 50 to 100 feet away when he saw the other car in the intersection, stating that his answer was so "then and it is now." He also testified that the other car was crossing the intersection at the rate of 20 miles an hour. Under either state of facts we think the jury were

justified in holding from his own testimony that defendant was negligent. If he was 50 to 100 feet away when the other car was already in the intersection, traveling at such a rate of speed as he testified to, he certainly had no right to keep ahead and try to avoid himself at the time of way under such circumstances. (Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

Defendant testified that he was only fifteen feet away and the other car was then close to the center of the intersection. He testified, a distance of about 50 feet from him, according to his own testimony, and he was going, as he testified, at about 10 miles an hour and could stop his car at that rate of speed within 10 or 15 feet. There would certainly have been no

difficulty in stopping his car before reaching the point of collision. Whichever view of his testimony be accepted it is not reconcilable with the exercise of ordinary care in such a situation.

Was there any evidence that justifies the inference of a want of care on the part of plaintiff. The evidence is such as to justify the conclusion that while the car in which plaintiff was riding was close to the center of the intersection defendant's car came down at a great rate of speed so suddenly and unexpectedly in an attempt to cross in advance of the other car that neither plaintiff nor her sister could have done anything to avoid the collision. They could not stop there, whether going 10 miles or 20 miles an hour, and could hardly have anticipated that when defendant was at a distance of 40 to 140 feet north of their car when they reached, or were about to reach, the center of the intersection he would undertake to cross in front of their car.

There is no room in the facts of this case for the application of the doctrine laid down in the case of Pientz v. Chicago Ry. Co., 224 Ill. 246. The evidence does not disclose that plaintiff had such notice of, or opportunity to learn of the danger that any warning she could have given to the driver of the vehicle would have avoided such danger.

The first instruction on the rule as to the preponderance of evidence that it be sufficient if it preponderates in plaintiff's favor "although slightly" has been condemned in Teter v. Spooner, 306 Ill. 193, and Belvita v. Rapid Transit Co., 327 Ill. 210. While the court said it was confusing in the cited cases it did not reverse the judgment for such error. Instructions given in defendant's behalf, however, fairly stated the law on the subject so that the jury could hardly have been misled.

difficultly in accepting his own belief regarding the point of collision. However, view of his testimony he accepted is in not reconcilable with the evidence of an injury case in such a situation.

Now we have any evidence that justified the inference of a point of view on the part of plaintiff. The evidence is such as to justify the conclusion that while the car in which plaintiff was riding was close to the center of the intersection defendant's car came down at a great rate of speed so that plaintiff was unable to avoid the collision. They could not stop short.

Whether going 10 miles or 20 miles an hour, and could possibly have anticipated that when defendant was at a distance of 20 to 100 feet north of their car they would reach, the center of the intersection he would understand even in front of their car.

There is no room in the facts of this case for the conclusion of the court that defendant was at fault. The evidence does not show that plaintiff had such notice of, or opportunity to learn of, the danger that any warning she could have given to the driver of the vehicle would have avoided such danger.

The first instruction on the facts as to the circumstances of evidence that it is sufficient if it preponderates in plaintiff's favor "without a doubt" has been contained in Judge v. ... and Judge v. ... and Judge v. ... This the court said it was containing in the cited cases it did not reverse the judgment for such reason. Instructions given in defendant's favor, however, clearly stated the law on the subject so that the jury could hardly have been misled.

Instruction No. 4 is criticised because it contains the words "if you believe from the evidence" instead of using the words "from a preponderance of the evidence." Various criticisms too are made of plaintiff's instruction No. 5, none of which, however, has any substantial basis. Most of the objections to both of these instructions were considered and held unavailing in Bank Bros. Coal Co. v. Thil, 228 Ill. 233, 241, 243. As to the refusal of defendant's instruction No. 20, it is sufficient to say that the subject was amply covered in other given instructions.

Finding no reversible error we affirm the judgment.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

372 - 32313

JOHN E. SULLIVAN,
Appellant,

v.

EDWARD L. GENSE and
DORA GENSE,
Appellees.

24-7-25
66-7a
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing a bill for want of equity. The bill charged a conspiracy between the defendants, husband and wife, to obtain from complainant by certain false and fraudulent representations and promises \$2000 for a one-half interest in a restaurant business carried on by the husband, assisted by his wife. The bill prayed that the partnership be set aside, the money repaid and an accounting had, and an injunction issued restraining defendant from incurring any other partnership debts. A temporary injunction was granted, and after answer the cause was referred to a master, who recommended a decree in accordance with the relief prayed for. The matter coming before the court on exceptions to his report the exceptions were sustained and the bill dismissed as aforesaid.

The findings of the master were in accordance with the averments in the bill to the effect that complainant relied upon false representations made to him that the gross daily receipts from the business ran as high as \$100 a day excepting during the months of July and August, and that the business was profitable,

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1940

22. 11. 1941

This is an appeal from a decree dissolving a bill for
want of equity. The bill charged a conspiracy between the
defendants, husband and wife, to obtain from complainant by
certain false and fraudulent representations and promises
for a one-half interest in a restaurant business owned by
the husband, executed by his wife. The bill prayed that the
partnership be set aside, the money repaid and an accounting had,
and an injunction issued restraining defendants from interfering
any other partnership debts. A temporary injunction was granted,
and after answer the cause was referred to a master, who
recommended a decree in accordance with the relief prayed for.
The master coming before the court on exceptions to his report,
the exceptions were sustained and the bill dismissed as unnecessary.
The findings of the master were in accordance with the
evidence in the bill to the effect that complainant relied upon
false representations made to him that the gross daily receipts
from the business ran as high as \$100 a day exceeding during the
months of July and August, and that the business was profitable.

whereby plaintiff was induced on such representations to pay \$2000 for a one-half interest as a partner in said business, and that the facts were that the average gross daily receipts amounted to only about \$57 a day; that the business was not profitable and was ultimately sold by order of court; that complainant on discovering the falsity of such representations demanded his money back, which defendants refused to give, and that the money is now held by the wife.

We have carefully reviewed the evidence taken before the master and think his findings were fully justified, and that the exceptions thereto should have been overruled and not sustained, and that complainant should have been given the relief prayed for.

It would subserve no useful purpose to review the evidence. So far as it rested upon the credibility of the witnesses, the master had a better opportunity of determining it than the chancellor, whose opportunity was no better than our own.

Appellees have filed no brief. The inference from appellant's brief is that the court dismissed the bill on the theory that complainant was negligent in failing to investigate and check up as to the representations made before paying his money. The evidence in the case was to the effect that the representations as to the business were positive, that complainant acted thereon in confidence of their truth, having known defendants for many years, that defendants knew of the falsity of such statements when made and that complainant was induced to act upon them. In such a case the party guilty of the fraudulent conduct will not be allowed to impute negligence to the one he has induced to act by his own deliberate fraud. (Leonard v. Springer, 197 Ill. 532; Fattis v. Semple, 12 Fed. (2nd) 276.) Such a representation under such circumstances is not a mere

thereby plaintiff was induced in such representations to pay \$2500 for a one-half interest in a bar not in said business, and that the facts were that the average gross daily receipts amounted to about \$50 a day; that the business was not profitable and was ultimately sold by order of court; that plaintiff learned on discovering the falsity of such representations demanded his money back, which defendant refused to give, and that the money is now held by the wife.

We have carefully reviewed the evidence taken before the master and think that findings were fully justified, and that the exceptions thereon should have been overruled and not sustained, and that complaint should have been given the relief prayed for.

It would appear no useful purpose to review the evidence so far as it relates upon the credibility of the witnesses. The master had a better opportunity of determining it than the chancellor, whose opportunity was no better than our own.

Appellants have filed no brief. The evidence shows that complaint was negligent in failing to investigate and check up on the representations made before paying his money. The evidence in the case was so the effect that the representations as to the business were untrue; that defendant could show in connection of their funds, having known defendant for many years, that defendant knew of the falsity of such statements then made and that complaint was induced to not trust them. In such a case the gross culpability of the transactions cannot will not be allowed to impose negligence on the one who has induced to act by his own deliberate fraud. (See Boyd v. Buziney, 171 Ill. 525; Boyd v. Buziney, 12 Ill. 230.)

Such a representation under such circumstances is not a mere

expression of opinion but is made as a statement of fact. (Murray v. Tolman, 162 Ill. 417; Leonard v. Springer, *supra*.) Upon a very similar state of facts in O'Donnell & Duer Bavarian Brewing Co. v. Farrar, 163 Ill. 471, the court held that complainants were entitled to the rescission of the contract on discovery of the real facts. Complainant made his purchase and went into the restaurant in the month of July, one of the months when the income from the restaurant was expected to be below the average. After a reasonable opportunity for discovery of the falsity of the representations upon which he was induced to enter the business and part with his money, he demanded the return of the money.

We think the equities were in his favor. The decree will be reversed for procedure in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Scallan, JJ., concur.

2481A-6631

VIOLET LEE MARTIN,
Appellee,

v.

EDWARD HAUSER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case grows out of a collision between two automobiles in the intersection of Division street and Earlov avenue, Chicago. In a trial without a jury for the recovery of damages the finding and judgment were against defendant for \$228.69 and costs, from which this appeal is taken.

Plaintiff's car was going south on said avenue and defendant's car east on said street, each on the right side of his respective street, and the cars collided in the southwest quarter of the intersection. Each claimed the right of way under the circumstances. There is the usual conflict of evidence as to their relative speed and distance from the intersection, when the first car (plaintiff's) entered it, and each argues the case mainly from the point of view of the evidence offered in his behalf.

Plaintiff testified that she was driving her Buick car eight to ten miles an hour across the car tracks on Division street and at that time defendant's car was about a half block to the west, and came suddenly on striking the front door of her car. There was substantial corroboration of her testimony by a person riding with her, and another on the street. The

2-1-10-10-1

STATE OF ILLINOIS
COURT OF CHICAGO

WILLIAM H. HARRIS
Appellant

vs.
JAMES H. HARRIS
Appellee

THE COURT OF CHICAGO, in and to the effect of the order of the court,

This case arose out of a collision between two

automobiles in the intersection of Division Street and Taylor

Street, Chicago. In a trial without a jury for the recovery

of damages the finding and judgment were in favor of the

appellee, from which this appeal is taken.

Plaintiff's car was going south on said street

and defendant's car went on said street, each on the right side

of the respective street. At the time the collision took place

each claimed the right of way

under the circumstances. There is the usual conflict of evi-

dence as to their relative speed and distance from the inter-

section, when the first car (plaintiff's) entered it, and as to

whether the same mainly from the point of view of the evidence

offered in his behalf.

Plaintiff testified that she was driving her Buick car

from her office on Taylor Street at the time of the collision

and at that time defendant's car was about a half block

to the west, and came suddenly on striking the front door of

her car. There was substantial conversation of her testimony

by a person riding with her, and another on the street. The

latter testified that defendant's car was going at a speed of 25 miles an hour when 130 to 135 feet west of Karlov avenue, and that plaintiff was crossing the intersection slowly, and that had defendant not turned southward after entering the intersection but continued on in his course he would, or could easily have passed in the rear of plaintiff's car.

The testimony in behalf of defendant was given by himself, a passenger in his car, and a street observer. Their testimony, however, was wholly irreconcilable with that of plaintiff's witnesses both as to the relative speed of the cars and defendant's distance from the intersection when plaintiff entered and was crossing it.

If plaintiff's witnesses were to be believed there was a cause of action, and if defendant's witnesses there was none. Their credibility was for the court who had the benefit of seeing and hearing the witnesses, rather than for us, in the absence of any circumstantial evidence or inherent defects of the testimony, to enable us to say that the court's findings were unauthorized. We shall, therefore, accept the court's conclusion as to the facts.

If the version of plaintiff's witnesses be accepted there could be no doubt of her right to cross the street in advance of defendant when his car was so far from the intersection at the time plaintiff had reached the center thereof and was proceeding across it. This court has so held on very similar states of facts. (Salmon v. Wilson, 227 Ill. App. 296; Heilder Hardwood Lumber Co. v. Wilson & Bennett Co., 343 id. 39; Fisher v. Johnson, 233 id. 25; Darling & Co. v. Yellow Cab Co., 233 id. 326.)

As to the question of damages we think there was sufficient competent proof to warrant the court's assessment.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

SCHWILKE-LAWLER COAL COMPANY,
a corporation,
Appellee,

v.

SAMUEL DUBINSKY and
LIEBIE DUBINSKY,
Appellants.

2484 663²
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a fourth class action brought in the Municipal Court for the recovery of the balance of the purchase price of coal sold and delivered by plaintiff to defendants.

Having by their pleadings admitted the contract and alleged a breach thereof defendants were required to and did assume the burden of proof, and at the close of the evidence offered in their behalf the court, on plaintiff's motion, directed a verdict in its favor for \$490.25.

There was no evidence having a legal tendency to establish the defense of a breach of contract. It shows that defendant, Samuel Dubinsky, went to plaintiff's yards and there "picked out" two car-loads of coal, saying, "I want to have these two cars of coal," and that the coal so selected was delivered to defendants. There was no evidence of any special arrangement as to its quality or the purpose for which it was purchased. Samuel Dubinsky complained to plaintiff about its smoking from heat or burning on different occasions where it lay in the basement, and on one occasion of such a complaint, some two or three months after the purchase and after defendants had used a portion of the coal, plaintiff's president went to defendants' premises with

... ..

firemen, who said they would have to break the wall of the premises. Defendant, Samuel Rubinsky, did not want the wall broken and said he would take the coal out himself, which he did. There was testimony by plaintiff's president, who was called in defendants' behalf, to the effect that spontaneous combustion of the coal was impossible and that the combustion was due, not to the fault of the coal, but to combustion in the smokestack where it was piled. Samuel Rubinsky testified that the coal was wet when he got it, and apparently relied on that fact as the cause of combustion. But that did not tend to show a breach of contract or that defendants did not get the actual coal they picked out. There was no evidence whatever on which to base a breach of contract or an implied warranty. Defendants having failed to sustain the burden of proof cast upon them by the pleadings the court properly directed a verdict.

Accordingly the judgment is affirmed.

AFFIRMED.

Grisley and Scanlan, JJ., concur.

Witness, who said they would have to break the wall of the
 premises. Defendant, Samuel Johnson, did not want the wall
 broken and said he would take the coal out himself, which he
 did. There was testimony by Plaintiff's witness, who was
 called in defendant's behalf, to the effect that defendant
 knew that the coal was impossible and that the combustion
 was due, not to the fault of the coal, but to combustion in the
 furnace where it was piled. Samuel Johnson testified that
 the coal was wet when he got it, and apparently failed to show
 that as the cause of combustion. That that did not seem to show
 a breach of contract or that defendant did not get the actual
 coal they agreed on. There was no evidence whatever on which
 to base a breach of contract or an implied warranty. Defendant
 failed to establish the fact in of good coal upon them by
 the plea that the coal properly directed a verdict.
 Accordingly the judgment is affirmed.

F. E. GARRY COAL COMPANY,
a corporation,

Appellee,

v.

ALFRED HAMBURGER, Inc.,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a fourth class case that was brought against appellant and Alfred Hamburger, individually. The record discloses that on January 13, 1927, the case came before the court for trial without a jury, and that a judgment for \$313.25 was entered on the court's finding against both of the defendants; that an appeal was granted and that 60 days were allowed for filing a bill of exceptions; that on January 21, by agreement of the parties, the judgment of January 13 was vacated and set aside, the suit dismissed as to the defendant Alfred Hamburger, and the cause again heard without a jury, and that a judgment for the same amount was entered against appellant herein; that appellant was allowed an appeal on filing an appeal bond and a bill of exceptions within 60 days.

An appeal bond was filed on the same day and extensions for filing a bill of exceptions were given, and one was presented and signed April 13, 1927, which has been incorporated into the record.

It appears, however, that the bill of exceptions so signed and incorporated is a stenographic transcript of the hearing had on April 13, and that there is no bill of exceptions

ALFRED HANSEN, Inc.,
Appellee.
v.
THE BANK OF AMERICA
Appellant.
COURT OF CHIEF JUSTICE

REVIEWED THE DECISION OF THE COURT.

This is a review of the decision of the court in the case of Alfred Hansen, Inc. v. The Bank of America, Inc., 1937, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

of the proceedings had on January 21 from the judgment on which this appeal was taken.

All of the assignments of error argued are predicated on the proceedings had during the trial, but the proceedings not having been preserved we cannot entertain them.

The judgment order of January 21 recites that the cause came on in regular course, and that the court heard evidence. In the absence of a bill of exceptions it must be presumed that the evidence so heard was sufficient to sustain the judgment.

There is nothing to indicate that the court made its findings and entered its judgment on the evidence heard at the previous hearing, and there is nothing in the record upon which we can assume that it did.

As the record purports to preserve by bill of exceptions the proceedings had on January 13 and not those had on January 21, the date of the hearing, and as there is no error shown in the common law record the judgment is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

of the proceedings had on January 21 from the judgment on which this appeal was taken.

All of the statements of error alleged are predicated on the proceedings had during the trial, but the record does not having been preserved we cannot ascertain them.

The judgment error of January 21 recites that the error came on in regular course, and that the court heard evidence.

The absence of a bill of exceptions is also so provided and the

evidence as heard was not taken to establish the judgment.

There is nothing to indicate that the court made the

findings and entered the judgment on the evidence heard at the

previous hearing, and there is nothing in the record upon which

we can assume that it did.

As the record presents no question of error of any kind

the proceedings had on January 21 and not those had on January 22.

The date of the hearing, and so there is no error shown in the

record for which the judgment is affirmed.

Very respectfully,
 J. H. ...

... ..

... ..

For ...

... ..

... ..

... ..

451 - 32392

RALPH E. ZETZIT,

Appellee.

v.

ANTHONY NOVOTNY,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury of a fourth class case in the Municipal Court of Chicago plaintiff recovered a judgment against defendant for \$400 as damages resulting from the collision of their automobiles.

Appellant concedes his negligence and seeks a reversal solely on the ground that the damages were computed upon a wrong theory of the law. But he has not presented such a record as enables us to pass on that question. As privileged to do under section 23, par. 6 of the Municipal Court Act, he has seen fit to incorporate in the record what is certified to by the clerk as "a correct statement of facts." Said section contemplates that where a review is sought on such a statement it shall also contain the questions of law involved and decisions of the court thereon. (Englewood Cash & Door Co. v. Goetzinger et al., 137 Ill. App. 13.) The document here certified to not only does not contain the questions of law submitted to or passed on by the court but does not set forth all the essential facts for the application of the law pertaining to damages which appellant seeks to apply. Some of the facts he relies upon are not recited as such but are left to be inferred from its recital of testimony. It has frequently

MR. JUSTICE

THE COURT

On a trial before the court without a jury at a fourth
case in the Municipal Court of Chicago plaintiff recovered
a judgment against defendant for \$400 as damages and the
costs of their automobile.

Appellant concedes his negligence and seeks a reversal
solely on the ground that the damages were computed upon a wrong
theory of the law. But he has not presented such a record as
entitles him to pass on that question. He is privileged to do under
section 23, par. 6 of the Municipal Court Act. He has seen fit
to incorporate in the record what is certified to by the clerk as
"a correct statement of facts." This section contemplates that
where a review is sought on such a statement it shall also contain
the questions of law involved and decisions of the court thereon.
The document now before the court is not only deficient in that it
does not set forth all the essential facts for the application of the
law pertaining to damages which appellant seeks to apply, but
of the facts he relies upon are not recited as such but are left
to be inferred from the recital of testimony. It has frequently

been held that what purports to be a statement of facts is insufficient under said section when it recites the testimony of witnesses. (Starks v. National Monthly Co., 275 Ill. 526; Starks v. Murphy, 183 Ill. App. 179; Schiavone v. Leddo, 179 id. 91; Columbia Ins. Co. v. Loeb's Ins. Agency, 137 id. 239; Frankenstein v. Weber, 138 id. 573; Nelson v. Chicago Building Const. Co., 209 id. 434.)

Appellant's argument involves as one question of fact the value of plaintiff's automobile before the accident. Its value as a matter of fact is not stated in the document certified to, which merely recites testimony on the subject. A recital of the testimony is quite different from a statement of fact in regard thereto.

It is manifest that the provisions of the statute for such a statement contemplate a review of questions of law only upon uncontroverted facts, and that the statement shall contain not only all of such questions of law involved, but the questions themselves and the rulings of the court thereon. In this respect the record intended for review is clearly differentiated from one containing a bill of exceptions or stenographic report, on which various questions of both fact and law may be raised.

The document certified to not being sufficient to present the questions sought to be reviewed we must affirm the judgment.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

It is noted that the above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

1992年12月22日

32454

WALLINGTON MARTIN,
Appellee,

v.

THE NATIONAL LIFE & ACCIDENT
INSURANCE CO.,
Appellant.

6674
249 L.A. 664
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUDGE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as beneficiary under a so-called endowment or industrial insurance policy to recover the amount of the endowment.

The policy contains this provision:

"No obligation is assumed by the Company prior to the date hereto, nor unless on said date the insured is alive and in sound health. Should the proposed insured not be alive or not be in sound health on the date hereof, any money paid to the Company as premiums hereon shall be returned."

The cause was heard without a jury. Plaintiff made proof of the policy, the death of the insured, of giving notice thereof to the company and of payment of the premiums, and then rested his case. Defendant tendered back the premiums paid, and the tender was, in effect, refused. Thereupon defendant moved for a finding in its favor based on the terms of the policy. The court declined to hear the law on the subject and denied the motion.

To make out a prima facie case it was incumbent on the plaintiff to make proof of compliance with the condition precedent of the obligation by proving that the insured was in sound health on and prior to the date of the policy. On his failure so to do

1. The first step in the process of creating a new product is to identify a market need. This involves conducting market research to determine what consumers want and what problems they are facing. Once a need is identified, the next step is to develop a concept that addresses that need. This is often done through brainstorming sessions with a team of designers and engineers. The concept is then refined through prototyping and testing, with feedback from potential users being used to make improvements. Finally, the product is launched into the market, and its performance is monitored to ensure it meets the needs of the target audience.

and which is the basis of the policy. On the other hand, it is the duty of the Government to maintain the public order and to protect the public interest. It is the duty of the Government to maintain the public order and to protect the public interest. It is the duty of the Government to maintain the public order and to protect the public interest.

it was error for the court to deny defendant's motion. The law is so well settled on that subject as to hardly require citation. But that there may be no mistake about it on another trial we refer to the case of Lewandowski v. Western & Southern Insurance Co., 241 Ill. App. 88, and the authorities there referred to.

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

32466

248 I.A. 664²

JOSEPH URBAN and
JOSEPH BAUMERUK,

Appellees,

APPEAL FROM MUNICIPAL COURT

v.

OF CHICAGO.

JULIUS REDRYSIK and
REGINA REDRYSIK,

Appellants.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an action for brokerage fees claimed to have been earned by plaintiffs in procuring a contract between defendants and one John Albrecht and his wife for an exchange of real estate.

The case was tried before the court without a jury and resulted in a finding and judgment for \$170 against defendants. This appeal followed.

The record shows that there was a written contract between defendants and the Albrechts for the exchange of property received in evidence, but it is not preserved in the bill of exceptions. We cannot, therefore, know its precise terms. Assuming, as we may, perhaps, from the evidence that each party agreed to give title to the other of the piece of real estate he was to exchange, nevertheless, it sufficiently appears that the Albrechts did not have title to the piece of property they proposed to exchange, and that Julius Redrysik refused to carry out the contract for that reason. It appears that his wife said she would not carry out the terms of the agreement, and that he also said that he did not want to go through with it because of his wife's refusal. But that was not his only reason. In response to the court's question why he did not go through with

810 A. 111. 604

THAT FROM MINISTERS' COURT
ON 21/1/1904

THE COURT OF
MINISTERS
ON 21/1/1904

DELIVERED THE DECISION ON THE CASE.

This is an action for recovery of property. It has been argued by counsel that the plaintiff is entitled to the property of the defendant and his wife for an exchange of real estate.

The case was tried before the court without a jury and resulted in a finding and judgment for the plaintiff. This appeal followed.

The record shows that there was a written contract between the plaintiff and the defendant for the exchange of property. It is not necessary in the bill of particulars to state the details of the contract. It is sufficient to state that the plaintiff has shown that such party, as we say, perhaps, from the evidence that such party agreed to give title to the other of the piece of real estate as was so exchanged, nevertheless it is not necessary to state that the plaintiff has not been able to the piece of property that was so exchanged, and that the plaintiff has not been able to carry out the contract for that reason. It appears that the wife said she would not carry out the terms of the agreement, and that the plaintiff said that he did not want to go through with it because of his wife's refusal. But that was not his only reason. In response to the court's question why he did not go through with

the deal he testified that it was because Albrecht had no title to the property, as he had learned through his representative, and that he was afraid if he bought it someone would take it away from him.

While the real facts as to title were not skilfully or accurately presented, enough remains in the record to show that the title to the Albrecht's property was in a third party who claimed to hold the same under some form of an agreement with the Albrechts, whether written or oral does not appear. But it clearly appears they never had title to the property. Nor does it appear that they even had a contract for the same.

To sustain's plaintiffs' claim for commissions in the deal it was incumbent upon them to show that the contract with the Albrechts was enforceable. It appearing, therefore, that the latter had no title to the property they proposed to exchange, and that therefore the contract could not be enforced against them, the case falls within the rulings of this court in Lucas v. Schwartz, 243 Ill. App. 418, and the cases there cited. It follows, therefore, that the court erred in its findings and entering judgment thereon.

Accordingly the judgment is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Gridley and Scanlan, JJ., concur.

The fact he testified that it was document. Although he had no title to the property, as he had learned through his representative, and that he was afraid if he brought it someone would take it away from him.

While the real estate as to title was not officially as successfully presented, enough remained in the record to show that the title to the Albrecht's property was in a third party who claimed to hold the same under some form of an agreement with the Albrechts, whether written or oral does not appear. But it clearly appears they never had title to the property. Her case is clear that they even had a contract for the same.

To sustain a plaintiff's claim for commission in the deal it was incumbent upon them to show that the contract with the Albrechts was enforceable. It appearing, therefore, that the latter had no title to the property they proposed to exchange, and that therefore the contract could not be enforced against them.

The court falls within the rulings of this court in Leach v. Leach, 242 Ill. App. 428, and the cases there cited. It follows, therefore, that the court erred in its findings and entering judgment that on.

Accordingly the judgment is reversed with a finding of costs.

REVEREND WITH A FINDING OF FACTS.

Stidley and Graham, J., concur.

32466

FINDINGS OF FACTS.

We find that the contract for exchange of real estate referred to in the statement of claim was made with parties who had no title to the real estate they undertook to exchange for defendants' real estate and, therefore, that the contract upon which the cause of action is predicated was unenforceable.

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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doi:10.1017/S0022292412001616

— *Journal of the American Medical Association*, 1967, 201: 1031-1032.

223 - 32164

WESTERN SECURITIES INVESTMENT
COMPANY, a corporation,
Appellee,

v.

THE GRIFFIN MINING COMPANY,
a corporation, JAMES W. FAVLICK,
JOSEPH A. HOLPUCH, JOSEPH A.
KLENHA, and FRANK POSVIC,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

STATEMENT BY THE COURT. In an action in assumpsit upon three promissory notes, each for \$10,000, signed by defendants as makers, there was a trial before a jury, and at the conclusion of defendants' evidence the jury were instructed to find the issues for plaintiff and to assess its damages at \$39,096.43, being principal and accrued interest. Such verdict was returned and on March 13, 1927, judgment was entered upon the verdict against defendants and, as each note provided for certain attorneys' fees, the court ordered that \$5,364.46, (being 15% of the damages awarded) be taxed as costs. Defendants appealed.

The notes, dated respectively at Denver, Colo., on October 17, 1923, November 17, 1923, and February 17, 1924, are all payable, on or before September 17, 1924, to the order of the Stearns-Roger Manufacturing Co., (hereinafter called the Stearns Co.) at the First National Bank of Denver, with interest at 7% until maturity, and 10% after maturity. All are endorsed by the payee, by R. W. Gordon, vice president, without recourse, to the bank, and all bear the further endorsement to plaintiff, without recourse, by the bank.

100-100000

100-100000

WESTERN RECOVERING INVESTMENT
COMPANY, a corporation,
appellant,

WESTERN RECOVERING INVESTMENT
COMPANY, a corporation,
appellant,

IN RE: COURT

THE COURT OF APPEALS
IN RE: COURT
THE COURT OF APPEALS
IN RE: COURT

In an action in rem...

upon three promissory notes, each for \$10,000, signed by defendant as maker, there was a trial before a jury, and at the conclusion of defendant's evidence the jury were instructed to find the answer for plaintiff and to assess its damages at \$22,000.42, being principal and accrued interest. Such verdict was returned and on March 18, 1934, judgment was entered upon the verdict against defendant and, as each note provided for certain attorney's fees, the court ordered that \$2,864.46, (being 12% of the damages awarded) be taxed as costs. Defendant

appellant.

The notes, dated respectively at Denver, Colo., on October 17, 1932, November 17, 1932, and February 17, 1934, are all payable, on or before September 17, 1934, to the order of the Western Recovery Investment Co., (hereinafter called the Western Co.) at the First National Bank of Denver, with interest at 12% until maturity, and 10% after maturity. All are endorsed by the notes, by R. W. Gordon, vice president, without recourse, to the bank, and all bear the former endorsement to plaintiff, "without recourse, to the bank."

The action was commenced on December 19, 1924. The declaration consisted of special counts and the common counts. In the former are alleged the delivery of the notes to the Stearns Co.; the making of the endorsements as stated; and the failure of defendants to pay the notes. Copies of them are attached to the declaration. Defendants filed a plea of the general issue, and, before trial, a special plea, designated as their "Third amended Additional Plea of Failure of Consideration." To this plea plaintiff filed a replication denying all of its material allegations.

In said special plea defendants alleged that the notes were given in part payment of the cost of, but prior to the completion of, a certain "flotation" mill upon the property of the Griffin Mining Co. (hereinafter called the Mining Co.), near Leadville, Colo.; that the individual defendants were then and now are residents of Cook County, Illinois; and that the Stearns Co. on September 15, 1923, submitted a written proposal to one Lucien W. Smith (president of the Mining Co.) for the erection and equipping of the mill.

A copy of this proposal is attached to and made a part of the plea. It is dated at Denver and signed by the Stearns Co. "by R. W. Gordon, Vice President and Gen'l Manager." After setting forth that, since the meeting in Denver, on September 4, 1923, between Gordon and Smith and his Chicago associates, the Stearns Co. has gone very carefully into the design of the proposed mill on the property of the Mining Co., that an engineer of the Stearns Co. has visited the site and that draftsmen have continuously been working on the plans, etc., it is stated that the Stearns Co. will build a mill on said property, "in accordance with our blue prints, Nos. 4186, 4187 and 4188, attached hereto," for \$65,000. It is further stated:

The action was commenced on November 12, 1934. The

testimony consisted of several counts and the common counts.

In the former and alleged the delivery of the notes to the

Co.; the making of the endorsement as stated; and the failure of

defendants to pay the notes. Copies of them are attached to the

complaint. Defendants filed a plea of the general issue, and

pleaded that the notes were not delivered to the

defendants, but of course of course. To this plea

plaintiff filed a replication denying all of the material allegations.

In said special plea defendants alleged that the notes

were given in full payment of the debt at, and prior to the

completion of, a certain "transaction" with the property of

the United States Co. (hereinafter called the United Co.),

located in Chicago, Ill.; that the individual defendants were then and now

are residents of Cook County, Illinois; and that the United Co.

is a corporation organized under the laws of the State of Illinois.

It is further alleged that the United Co. for the purpose and carrying

out the same.

A copy of this complaint is attached to and made a part

of the plea. It is dated at New York and signed by the United Co.

"W. H. V. Gordon, Vice President and General Manager." After making

thereof, there was made in New York, on September 4, 1934,

between Gordon and said United Co. a certain agreement, the terms

of which are very carefully set forth in the details of the proposed bill

on the property of the United Co., and on payment of the same

Co. has visited the site and the defendants have continuously been

working on the same, etc., it is stated that the United Co. will

build a mill on said property, "in accordance with our plans

and 1934, 1935 and 1936, attached hereto." For \$25,000. It is

further stated:

"We are attaching a list of machinery that we will furnish. We will install the entire machinery and equipment, including that furnished by you, erect the building and complete it ready for operation as fast as delivery of lumber and weather conditions in Leadville will permit.

Our responsibility and expense, in so far as construction of the mill, will cease as soon as the mill will operate continuously under our direction for a period of eight hours, and thereafter, for a period of three months, a mill superintendent selected by us and paid by you is to have the control of the operation of the plant. The first three months of the operation of a plant are the most difficult and we propose to secure the services of the best available man so that full capacity and the best extraction may be obtained at the earliest possible date."

Then follow statements as to payments for the work, viz., \$35,000, by four checks of the Mining Co. aggregating that amount, one for \$10,000, upon acceptance of the proposal, and the other three respectively in 30, 60 and 90 days thereafter; also three notes of \$10,000 each, to be signed by the Mining Co. and some of its associates, one in 30 days and another in 60 days after acceptance of the proposal, and the third 90 days after such acceptance "or immediately upon completion of the construction work as evidenced by the continuous operation of the mill for a period of eight hours," - all of the notes to be payable in one year from the acceptance of the proposal. The proposal continues:

"During the construction of the mill, our Engineers will conduct extensive tests on samples of your ore so that full data may be available to the operating superintendent, immediately the mill is placed in operation. We will make no charge for testing work which our Engineers will do, but expect to bill you with the actual cost to us of the assays. * *

In conclusion, we will say that we have been looking forward for a long time to the construction of this mill as we knew a mill would ultimately be built on such a valuable property. We appreciate the number of friends you have in the vicinity of Leadville and your knowledge of local conditions and we expect to make full use of this knowledge and your friends to the end that an absolutely first-class mill may be built in the last possible time."

Defendants further alleged in the plea that they had no knowledge of or experience in mining, or in the construction

or operation of flotation mills; that prior to and on September 17, 1923, the Stearns Co., by its duly authorized agents, represented to them that it had made a thorough inspection and examination of the mine and of the ore therein and upon the dumps, and tests and assays of the ore, and that it "guaranteed" to them that it would be profitable for the Mining Co. to erect a mill "of not to exceed 50 or 100 tons per day capacity," and that the tests and assays justified the erection and operation of such a mill; that on September 17, 1923, the proposal was presented to defendants in Chicago; that certain blue prints or plans, mentioned in the proposal as being attached thereto, were not in fact so attached or submitted to them; and that they, however, relied upon said representations and guarantees, and accepted the proposal in a letter of that date addressed to the Stearns Co. (copy attached and made a part of the plea). In the letter it is stated that the price mentioned for the construction of the mill, \$65,000, "is entirely satisfactory to us, and also the entire proposal." It is, however, provided in the letter that, in lieu of the payment of \$25,000 by checks in 30, 60 and 90 days, notes of the defendants, Holpuch and the Mining Co., are to be given. The letter is signed by the Mining Co., and by defendants Holpuch and Pavlicek, and below their signatures is the following: "Accepted. Stearns-Roger Mfg. Co., by A. G. Laman, Sept. 17, 1923."

Defendants further alleged in the plea that thereafter the Stearns Co. commenced the erection of the mill, and as the work progressed they, relying upon said representations, delivered the notes sued upon; that after the mill had been put in operation they ascertained that it had not been erected or equipped according to said blueprints or plans, that it had a production capacity of from 175 to 200 tons per day, and that the tests of the ore did not

on operation of this plant which was on September 17, 1933, the Bureau Co., by the duly authorized agents, representative of the Bureau Co., had made a thorough inspection and examination of the plant and of the ore therein and upon the basis of the results of the inspection, and that it is "satisfied" to state that it could be "utilized" for the Bureau Co. to produce a mill "or not to exceed 50 or 100 tons per day capacity," and that the Bureau Co. could "utilize" the material and equipment of the plant, as shown in Exhibit 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 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727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

warrant the erection of such a mill; that the Stearns Co. well knew that the mine, and its facilities for handling the ore, did not exceed 60 tons per day capacity, and that a mill of greater capacity would be a failure and wholly useless to defendants, and could not be operated without continuous great losses; that the mill as erected and equipped is wholly useless and cannot be operated without such losses; that the consideration for which the notes were given has wholly failed; and that plaintiff "is not a bona fide holder and owner of said notes for value and without notice before maturity."

Upon the trial, in addition to introducing the notes in evidence, plaintiff read the depositions of several witnesses, viz., J. C. Houston, cashier of the Denver bank, C. C. Bennett, president of plaintiff, and Thomas B. Stearns, president of the Stearns Co. and also vice president of plaintiff. Their testimony was to the effect that the Stearns Co., the payee of the notes, "discounted" them at the bank on July 17, 1924; that shortly after September 17, 1924, (date of maturity) Bennett personally came to the bank and "purchased" for plaintiff all three notes and the bank endorsed them to plaintiff as shown; that plaintiff has been in possession of them ever since; and that defendants have not paid them or any part thereof. R. F. Gordon, a resident of Denver, and the vice president and a director of the Stearns Co., was plaintiff's only witness present at the trial. While stating that he was neither a stockholder nor an officer of plaintiff, he testified that he was "here representing" it. He further testified that the accrued interest on the notes amounted to \$9,096.43, which with the principal sums made an aggregate amount due of \$39,096.43; that, as the notes provided for attorneys' fees of 15% in case of suit, there was also due for such fees the additional sum of \$5,864.46; that he had "made an

...the execution of such a bill; that the ...
...the ... and the facilities for handling the ...
...not caused so large a ... and that a bill of exchange
...especially would be a ... and wholly in case of ...
...could not be expected without ...
...bill as ... and ... is wholly ... and cannot be ...
...without such ... that the consideration for which the notes were
...given was ... and that plaintiff ...
...holder and owner of said notes for value and without notice before
...plaintiff.

Upon the trial, in addition to ... the notes in
evidence, plaintiff ... the deposition of several witnesses, viz.,
J. C. ... of the ... Bank, ... of plaintiff, and Thomas ...
and also vice president of plaintiff. Their testimony was to the
effect that the ... the ... of the notes, "discovered"
them at the bank on July 17, 1904; that shortly after September 17,
1904, (date of maturity) ... personally came to the bank and
"presented" for plaintiff all these notes and the bank endorsed them
to plaintiff to show that plaintiff has been in possession of them
ever since; and that defendants have not paid them or any part thereof.
... a ... of ... and the vice president and
a director of the ... the plaintiff's only witness present
at the trial. While ... that he was either a ...
an officer of plaintiff, he testified that he was "not remembering"
... the ... that the ... interest on the notes
amounted to \$2,086.43, which with the principal sum made an
aggregate amount due of \$28,086.43; that as the notes provided for
attorneys' fees of 1% in case of suit, there was also due the sum
from the additional sum of \$2,808.43; that he had "made an

arrangement with our counsel (meaning counsel for the Stearns Co.) in regard to the payment of fees;" that the arrangement was that they were to get 10 per cent of the principal and interest due on the notes, whether there was a recovery or not; that plaintiff "is an organization which is used by the Stearns Co. for the purpose of collecting their bills, notes and things of that kind, - that is their regular business;" and that the two companies are associated together, - occupying offices in the same building.

To sustain the allegations of their special plea, defendants introduced considerable evidence, oral and documentary. All the individual defendants testified, as did H. W. Haylett, and Henry G. McClain, a mining engineer residing at Leadville, and Joseph P. Ruth, Jr., engaged in Denver in the business of designing and constructing mills to be used in connection with mines.

Haylett, a resident of Chicago and an officer of the Mining Co., testified that during the summer of 1893, he introduced Smith, President of the Mining Co., to Holpuch and Pavlicek in Chicago and there were discussions as to the properties of the Mining Co.; that thereafter Smith, Haylett, Klenha and Pavlicek visited the mine, and on September 4, 1893, all met Gordon in Denver; that they then were interested in checking up on certain statements made concerning the mine and the character and amount of ore upon the dumps and in the mine; that a milling rather than a mining proposition was being considered; and that at this conversation Gordon, a representative of the Stearns Co., made certain statements and verbal guarantees. Upon Haylett being asked to give the substance of the conversation and Gordon's said statements, he was not allowed to do so. He further testified that later in September, 1893, Smith and A. P. Leman came to Chicago and met Haylett and the individual defendants, and the written proposal

agreement with my counsel (written contract for the 1000 lbs.)
in regard to the payment of local tax, the agreement was that
they were to get 15 per cent of the principal and interest and on
the note, which there was a security of note that principal in
an organization which is used by the Federal Co. for the purpose of
obtaining bank bills, notes and things of that kind. - That is
main regular business, and that the two companies are now in
business, a company of 1000 lbs. in the same business.
The company has a number of men in the same business, and
the individual statements located, as did H. H. Hays, and
Henry E. Hays, a mining engineer residing at Louisville, and
Joseph E. Hays, Jr., engaged in the business of designing
and engineering mills to be used in connection with mines.
Hays, Jr., a resident of Chicago and an officer of the
Federal Co., testified that during the summer of 1905, he intro-
duced Hays, Jr., President of the Mining Co., to Hays and Hays
in Chicago and their two daughters as to the properties of the
Mining Co. that Hays, Jr., Hays, Jr., Hays and Hays
visited the mine, and on September 4, 1905, all met together in
Chicago; that they were interested in checking up on certain
statements made concerning the mine and the character and amount of
ore upon the mine and in the mine; that a mining register was
made, a proposition was being considered; and that at this con-
ference Hays, Jr., a representative of the Federal Co., made certain
statements and verbal promises. Upon Hays, Jr. being asked to give
the substance of the conversation and Hays, Jr. said statements, he
was not allowed to do so. He further testified that later in
September, 1905, Hays and Hays came to Chicago and met
Hays and the individual statements, and the written proposals

of the Stearns Co. was presented and considered; that at this time no blue prints or plans, or any list of machinery, were attached to the proposal, or submitted; and that on September 17th, a reply to the proposal, dictated by Poovie, was signed and delivered to Daman. This proposal and reply were introduced in evidence, without objection by plaintiff. Haylett further testified that, when the reply was delivered, Daman was informed that it was "tentative and subject to confirmation by a representative of defendants who would later go to Denver for a further interview with the Stearns Co." Haylett was asked if anything was said at the meeting by Daman or others as to the statements and guarantees which had previously been made by Gordon, but he was not allowed to answer. Thereupon defendants made an offer to prove by Haylett that at the interview had with Gordon in Denver on September 4, 1923, Klenha told Gordon that neither he nor his associates knew anything about mining or milling, that he and Pavlicek had visited the mine and had examined piles of ore there on the dumps, that Smith had informed them that the Stearns Co. had been working on designs for a mill on the property, had made tests of said ore and that those tests had shown that a mill erected by the Stearns Co., as so designed, would give a return of from \$3 to \$4 per ton on the 50,000 tons of ore on the dumps and on the same number of tons to be taken from the mine; that Gordon then stated that the information imparted by Smith was correct; that Klenha then said that if he and his associates should become interested in the proposition it would only be because of guarantees of the Stearns Co. that a mill could be erected at the mine which would make such a return; that Gordon replied that if Klenha and his associates would interest themselves in the project and build such a mill as the Stearns Co. was designing, the Stearns Co.

of the design Co. was presented and considered; that at this time as also plans or plans, or any list of machinery, were attached to the proposal, or submitted; and that on September 17th, a reply to the proposal, dictated by Kewin, was signed and delivered to Kewin. This proposal and reply were introduced in evidence, without objection by Plaintiff. Kewin further testified that, when the reply was delivered, Kewin was informed that it was "tentative and subject to confirmation by a representative of defendant who would later go to Denver for a further interview with the design Co." Kewin was asked if anything was said at the meeting by Kewin or others as to the statements and circumstances which had previously been made by Kewin, but he was not allowed to answer. Thereafter Kewin made an effort to prove by Kewin's statement that the defendant had with Kewin in Denver on September 4, 1932, Kewin said Kewin had neither to nor his own mind any saying about mining or milling. That he and Kewin had visited the mine and had examined plans of the mine on the design, that Kewin had informed him that the design Co. had been working on designing for a mill on the property, had made plans of said mill and that those plans had shown that a mill erected by the design Co., as so designed, would give a return of 12% to 15% on the investment of \$200,000.00. That he and Kewin had been told that the design Co. was not interested in the proposition it would only be because of the design Co. That a mill could be erected at the mine which would make such a return; that Kewin replied that if Kewin and his associates would interest themselves in the project and build such a mill as the design Co. was so designed, they would be

would guarantee that the mill would give a return to them of from \$3 to \$4 per ton on the ore on the dumps and in the mine; and that Gordon's representations and guarantees were made known to defendants, Holpuch and Pesvic, at the Chicago meeting on September 17, 1923, and that all defendants relied upon them when they either signed or agreed to the letter of September 17th, replying to the proposal of the Stearns Co. Plaintiff's objection to the offer was sustained. Haylett further testified that shortly after September 28, 1923, he again talked with Gordon in Denver in reference to said blue prints or plans, and requested delivery of them as well as the list of machinery; that Gordon said that the blue prints "were still in process of being made," but that defendants should entertain no concern about the mill, as the Stearns Co. would provide for all of defendants' needs; that there was further conversation as to what the blue prints showed as to the capacity of the proposed mill; and that Gordon said that the plans then being prepared were "for a 50 or 100 ton capacity mill."

Klenha and Pavlicek corroborated Haylett as to the meeting in Denver on September 4, 1923. They were not allowed to state what representations or guarantees Gordon then made. They also corroborated Haylett as to the fact that at the Chicago meeting on September 17th, no blue prints or plans or any list of machinery were attached to the proposal of the Stearns Co. or then submitted.

Frank Pesvic, a defendant and an attorney-at-law in Chicago and acting as such for defendants in the negotiations and after the mill had been constructed, corroborated Haylett as to the happenings at the Chicago meeting on September 17, 1923. He was not allowed to testify as to certain statements then made by

[illegible]

Smith, in Laman's presence, concerning the representations and guarantees claimed to have been made by Gordon; or to testify, as offered, that he (Posvic) stated to Smith and Laman that defendants' letter of acceptance to the proposal should be held in abeyance until he could go to Denver and see Gordon; or that when he went to Denver on September 22nd, and before he had released the letter of acceptance, Gordon confirmed to him the representations and guarantees made in Denver early in September. Posvic further testified that at this interview Gordon told him that the blue prints or plans, had not in fact been completed; that Posvic saw them in the drafting room in an incomplete state; and that the first time he ever saw completed copies of them was in November, 1926, when they were delivered to him by one of plaintiff's attorneys. These copies, consisting of three sheets, were introduced in evidence as defendants' exhibits, Nos. 10, 11 and 12. Each sheet is endorsed, over the name of the Stearns Co., "printed Nov. 11, 1926." Posvic further testified that at the same interview, he informed Gordon that the list of machinery, mentioned in the proposal as being attached thereto, was not so attached; that Gordon expressed surprise, procured what he said was a carbon copy of the list, and gave it to Posvic. This list, consisting of two sheets, was introduced in evidence as defendants' exhibit No. 9. Posvic further testified that after the interview he visited the mine, again visited it in November, 1923, when construction of the mill had been commenced, and again just prior to the first operation of the mill about the middle of April, 1924; that the mechanical operation thereof was first in charge of Laman and one Matthews, both representatives of the Stearns Co.; that the mill was operated on and off until June 10, 1924, when it was closed down; that prior to this closing down its operation had been

which in human's presence, concerning the representations and
expressions claimed to have been made by Jordan; or to testify
as offered, that he (Povoy) stated to him and human that
defendants' letter of acceptance to the proposal should be paid
in advance until he could go to Denver and see Jordan; or that
when he went to Denver on September 14th, and before he had re-
ceived the letter of acceptance, Jordan continued to him the
representations and expressions made in Denver orally in substance,
Povoy further testified that at this interview Jordan told him
that the blue prints of plans, had not in fact been completed;
that Povoy saw them in the dining room in an incomplete state;
and that the first time he ever saw completed copies of them was
in November, 1934, when they were delivered to him by one of
plaintiff's attorneys. These copies, consisting of three sheets,
were introduced in evidence as defendants' exhibits Nos. 10, 11
and 12. Each sheet is numbered, over the name of the defendant
"Printed Nov. 11, 1934." Povoy further testified that at the
same interview, he informed Jordan that the list of machinery
mentioned in the proposal as being attached thereto, was not so
attached; that Jordan expressed surprise, growled what he said
was a carbon copy of the list, and gave it to Povoy. This list,
consisting of two sheets, was introduced in evidence as defendants'
exhibits Nos. 9. Povoy further testified that after the interview
he visited the mine, again visited it in November, 1935, when con-
struction of the mill had been commenced, and again later prior to
the first operation of the mill about the middle of April, 1936;
that the mechanical operations thereof were then in charge of whom
and one defendant, both represented at the January 20, 1936
the mill was operated on and off until June 10, 1936, when it was
shut down; that prior to this closing down the operation had been

in charge of one Biddle, sent for that purpose by the Stearns Co., and at defendants' expense, in accordance with the proposal; that at all times the Stearns Co. had the direction and control of its operation, first through Matthews and then Biddle; that on June 10, 1904, a stockholders' meeting of the Mining Co. was held at Leadville; that defendants then ascertained that the mill had been constructed for a daily capacity of from 175 to 200 tons of ore, that there was not enough ore to feed the mill, that mechanically it was a failure, that the metals in the ore were not properly separated, and that the tailings, containing valuable portions of the ore, went down the creek; and that it was decided at the meeting to stop all operation of the mill, and it has not since been operated. The witness was not allowed to testify that at said interview with Gordon about September 20, 1903, he asked him the meaning of the words "best extraction," contained in the proposal, and that Gordon replied that the meaning was that "there would be a separation of minerals so that they would have a marketable value."

Henry G. McClain, a mining engineer, after stating that he had examined the ores of the mine in 1901, and again shortly prior to the trial, and the minerals which they contained, viz., silver, lead, zinc, iron, gold, etc., testified that he visited the mine when the mill was being constructed and again after the mill had finally been shut down; that he had examined the copies of the blue prints or plans, consisting of three sheets, introduced in evidence; that while they are entitled "concentration mill," they "purport to show a flotation mill;" that he had compared them with the mill as built; that the different sheets in themselves do not agree and in many particulars do not agree with the mill as built; that the opening labelled "mill-bin" shows on the plans

three or four variations as to size, and the bin as constructed conforms with none of them; that the plans do not show any location for the coarse ore bin with reference to the rest of the mill; that the dimensions by scale or otherwise for this bin had not been complied with; that a strip of the building, 12 feet wide, 20 feet high, and 80 feet long, as shown in the plans, had not been built; that the retaining wall on the uphill side of the mill, provided for the purpose of keeping out drainage water, shows on the plans for a height of 6 feet, 4 inches, and the wall actually was constructed at a height of one foot, 4 inches; that this was an important defect, owing to the altitude of the mine above sea level, the presence of snow for many months of the year and the running of waters caused by melting of the snow and the letting in of water into the mill and affecting the machinery; that the roof did not conform in extent or slope with the plans and there were breaks in the roof due to poor construction; that the main framing of the building did not agree with the plans; that there were no concrete floors under the concentrate bins, as provided in the plans, and the bins were built about 25% smaller than as indicated on the plans; that much of the machinery was set in different places than as shown on the plans; that the term "mill," as used in the mining industry, meant a building containing machinery for the grinding of ore and the separating of the minerals contained therein in order to get a marketable value; and that each kind of mineral had to be separated from the others in order to be marketed to the best advantage. The witness described how a "flotation mill" operated, and what was necessary to make the separations of the various minerals satisfactory from a commercial standpoint, and further testified that, in building such a mill, the first thing to know was the character of the ore, and then the tonnage that was expected to be handled, and then the machinery to be

There are four variations in the design and the size of the
containers with some of them that the plans do not show any
location for the same and the size with reference to the size of the
mill; that the dimensions by some of them for this plan had
not been specified with that a strip of the building, 12 feet wide,
20 feet high, and 30 feet long, as shown in the plans, had not been
shown; that the retaining wall on the right side of the mill,
provided for the purpose of keeping out drainage water, shown on
the plans for a height of 4 feet, 6 inches, and the wall actually
was constructed at a height of one foot, 6 inches; that this was
an incorrect detail, being so the altitude of the mine above the
level, the purpose of some for many months of the year and the
purpose of water caused by melting of the snow and the falling
in of water into the mill and affecting the machinery; that the
need did not conform in extent to slope with the plans and there
were errors in the plan for the poor construction; that the main
function of the building did not agree with the plans; that there
were no concrete floors under the concrete slabs, as provided
in the plans, and in this case mill shown had another floor
in the plan; that much of the machinery was not in
different places than as shown on the plans; that the term "mill,"
as used in the mining industry, meant a building containing machinery
for the grinding of ore and the separating of the minerals contained
therein in order to get a marketable value; and that such kind of
mill had to be separated from the others in order to be marketed
as the mill is unique. The witness described how a "flotation
mill" was constructed with the following details:
Various electrical machinery from a commercial standpoint, and
further specified that, in building such a mill, the first thing to
know was the character of the ore, and then the design and
was expected to be handled, and then the machinery to be

provided with which to take care of that tonnage; that, while the plans did not state the capacity of the proposed mill, they showed that it was contemplated that the mill should have a 200 to 250 ton per day capacity; that the plans did not indicate the ore flow, which was a necessary thing for the successful operation of such a mill; that there was no provision for two important functions, viz., the proper conditioning of the ore for selective flotation, and the proper handling of the product made; that, as to the practical functioning of the mill, as to the silver in the ore, it was so built as to lose practically all of the silver; that as to the zinc it did not make such a separation as to get zinc concentrate of a commercial value, and was so built as to lose a large part of the zinc; and that as to the lead, it was so mixed with zinc that only a very small proportion of clean lead could be obtained.

Joseph P. Ruth, Jr., a designer and constructor of mills for the recovery of gold, silver, lead and other minerals out of ores, and specializing in "flotation metallurgy," testified that he first visited the mine in 1925, and there met the witness Haylett, when the construction of the mill had just been commenced; that he again saw the mill in 1926, during operation, and again in 1927; and that he had compared the copies of the plans introduced in evidence with the mill as built. He pointed out differences between the plans and the mill as built, substantially as stated by McClain, and stated what a "flotation" mill was, and what the meaning of the term was as understood by the mining industry and the object sought to be accomplished by such a mill. He further testified that when certain minerals were separated from the ore and other minerals therein they had great value, but when remaining combined were practically worthless, and that the plans purported to show a

provided with water to run over at that stage of the mill, while the plans did not state the capacity of the proposed mill. They showed that it was contemplated that the mill should have a flow of 250 ton per day, especially that the plans did not indicate the one flow, which was necessary for the successful operation of such a mill; that there was no provision for the important features, viz., the proper conditioning of the ore for selective flotation, and the proper handling of the product made; that, as to the practical functioning of the mill, as to the river to the ore, it was so built as to load practically all of the river; that as to the time it did not make such a separation as to get the concentration of a substantial value, and was so built as to lose a large part of the line; and that as to the load, it was so mixed with the mill only a very small proportion of clean iron could be obtained.

With this, a designer and character of mill for the necessary gold, silver, iron and other minerals out of ore, and specialized in "flotation metallurgy," located that he first visited the mine in 1907, and there met the witness Nichols when the construction of the mill had just been commenced; that he again saw the mill in 1908, during operation, and again in 1909 and that he had compared the design of the plans introduced in evidence with the mill as built. He pointed out differences between the plans and the mill as built, substantially as stated by McElain, and stated that a "flotation" mill was, and what the meaning of the term was as understood by the mining industry and the object sought to be accomplished by such a mill. He further testified that when certain minerals were separated from the ore and other minerals thereon they had great value, but when remaining combined were practically worthless, and that the plans purported to show a

flotation mill, for the purpose of separating the minerals in the ores, and that the mill did not properly function as such. He gave many illustrations of improper functioning, all tending to show that it was not a first class mill, such as the Stearns Co. had in its proposal agreed to construct.

At the close of defendants' evidence plaintiff moved that all of it be excluded from the jury and that they be instructed to return a verdict in plaintiff's favor for the amount due on the notes, as shown by Gordon's testimony. Objection having previously been made by plaintiff to some of the testimony of McClain and Ruth, upon the ground that it varied from the allegations of defendants' special plea, defendants asked leave to file a "fourth additional plea of failure of consideration." The court gave defendants leave to present such plea, and delayed ruling on plaintiff's motion for a directed verdict. Subsequently defendants presented such additional plea. It contained many of the allegations as set forth in said third plea, and additional allegations to the effect that the blue prints or plans, referred to in the proposal of the Stearns Co., provided for the erection of a flotation mill; that such a term had a definite meaning in the mining industry and which was understood by the Stearns Co.; that the term meant a mill that would separate ore coming from a mine into its component minerals so as to obtain a recovery of concentrates of commercial value; that defendants, relying upon the proposal of the Stearns Co. to erect such a mill that would perform such functions and obtain such results, accepted it; that the Stearns Co. did not in fact construct such a mill, but one which was wholly useless to defendants, in that it failed to operate and function as such a mill, and did not separate ore into its component minerals so as to obtain a recovery of concentrates

...the purpose of separating the minerals in
the ore, and that the mill did not properly function as such.
He gave many illustrations of improper functioning, all tending
to show that it was not a first class mill, even as the Starnes
mill had in its proposed aspect to construction.

As the cause of defendant's evidence plaintiff moved

that the jury be instructed to return a verdict in favor of the

defendant, as shown by defendant's testimony.

Objection having previously been made by plaintiff to each of

the testimony of Hollins and each, upon the ground that it varied

from the allegations of defendant's special plea, defendant

asked leave to file a "fourth additional plea of failure of

construction." The court gave defendant leave to present

such plea, and delayed ruling on plaintiff's motion for a

directed verdict. Subsequently defendant presented such

additional plea. It contained many of the allegations set out

in the third plea, and additional allegations to the

effect that the same plans or plans, referred to in the proposed

of the Starnes Co., provided for the erection of a flotation mill

that such a mill had a definite meaning in the mining industry

and which was understood by the Starnes Co. that the same meant

a mill that would separate the minerals from a mine into the

component minerals as to obtain a recovery of concentration

of mineral value; that defendant, relying upon the proposed

of the Starnes Co., so erect such a mill that would perform such

functions and obtain such results, accepted it that the Starnes

Co. did not in fact construct such a mill, but that it was

wholly useless as defendant, in that it failed to separate and

function as such a mill, and did not separate the minerals

from the minerals as to obtain a recovery of concentration

of commercial value; that, therefore, the consideration for which the notes were given has wholly failed; and that plaintiff is not a bona fide holder of said notes for value and without notice before maturity. After argument the court denied leave to defendants to file said fourth additional plea, and sustained plaintiff's motion for a directed verdict in its favor, and thereafter entered the judgment appealed from.

MR. JUSTICE GAILLEY DELIVERED THE OPINION OF THE COURT.

The main contention of counsel for defendants is that the trial court erred in instructing the jury at the close of defendants' evidence to return a verdict in plaintiff's favor for the amount as shown, and in entering the judgment. The argument is in substance that, considering the proposal of the Stearns Co. of September 18, 1922, defendants' letter of September 17, 1923, the blue prints or plans, and all the facts and circumstances in evidence, particularly the testimony of the witnesses Posvic, McClain and Ruth, and all legitimate inferences and reasonable presumptions to be drawn therefrom, the issue of failure of consideration for the notes, as charged in defendants' third amended and fourth additional pleas, should have been submitted to the jury for their determination under proper instructions.

After carefully considering the evidence and the briefs of counsel we have reached the conclusions that there is merit in the contention and argument, that it is in the interests of justice that the judgment should be reversed, and that upon remandment the cause should be submitted to a jury. We think that there was sufficient evidence tending to show such a failure of consideration for the notes as warranted a jury passing upon the question. It is well settled that if there is any evidence, with all legitimate and natural inferences to be drawn therefrom, which fairly tends to support a plaintiff's case or a defendant's affirmative defense, it must be submitted to a jury. (Shannon v. Nightingale, 321 Ill. 108, 175; Yess v. Yess, 235 Ill. 414, 418.) And we think that the court erred in not allowing defendants, before judgment entered, to file their fourth additional plea.

Defendants' counsel also contend that the court erred in refusing to admit the offered testimony of defendants'

witness Maylett, and similar offered testimony of certain other witnesses, as to verbal representations and guarantees claimed to have been made by Gordon, general manager of the Stearns Co. in Denver early in September, 1923. We do not think that any error was committed in these particulars. If the representations and guarantees were made as claimed, they were made at a time when preliminary negotiations were pending between the parties, which resulted in the Stearns Co. thereafter making a proposal in writing to build and equip for defendants as therein stated a mill at the mine. The claimed representations and guarantees are not contained in this proposal, which afterwards was accepted by defendants. In defendants' letter of September 17, 1923, regarding said proposal, it is stated that the entire proposal is satisfactory to them. We think that the court properly refused to admit the offered testimony.

Plaintiff by its counsel here contends for the first time that, inasmuch as the First National Bank of Denver became a holder in due course of the notes, for value and before maturity and without notice of any defenses thereto, plaintiff, as the bank's assignee thereof, for value after maturity, took title to the notes free from the defense of failure of consideration, and that the judgment must be affirmed. This contention is contrary to the theory on which the case was tried in the circuit court by both parties. No suggestion was made by plaintiff's attorney during the trial that the defense of failure of consideration was not open to defendants. It is said in Levy v. Standard Elevator Co., 296 Ill. 296, 304, "It is a well settled rule of law that a person cannot try a case on one theory in the trial court and on another theory in the court of review." But, in our opinion, there is no merit in plaintiff's contention. In 3 Corpus Juris, p. 470, Sec. 686, it is said: "Where the payee of a note sells it to an innocent third person and repurchases it for value,

witnesses, and similar efforts for the purpose of securing evidence, as to verbal representations and statements claimed to have been made by Jordan, General Manager of the Security Co. in Denver, early in September, 1935. It is not clear that any error was committed in these statements. If the representations were made as claimed, they were made at a time when preliminary negotiations were pending between the parties, which resulted in the Security Co. thereafter making a proposal in writing to settle and bring for settlement an amount stated as \$100,000. The alleged representations made and the request for settlement in this regard, which efforts were suggested by defendant, in defendant's Exhibit of Documents, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Plaintiff's Exhibit 1000 contains the first

time that, inasmuch as the First National Bank of Denver became a holder in due course of the notes, for value and before maturity and without notice of any defense thereto, plaintiff, as the bank's assignee thereof, for the first time, took title to the notes free from the defense of failure of consideration, and that the judgment must be affirmed. This contention is contrary to the theory on which the case was tried in the district court by both parties. The suggestion was made by plaintiff's attorney during the trial that the defense of failure of consideration was not open to defendant. It is not open to defendant. Plaintiff cannot say a word on this theory in the trial court. But, in our view, the theory in the court of review. But, in our view, there is no merit in plaintiff's contention. In 8 Corpus Juris, p. 470, sec. 666, it is said: "Where the payee of a note sells it to an innocent third person and repurchases it for value,

he does not thereby become possessed, as a bona fide purchaser, of any better right as against the maker than he possessed in the first instance. The same is true where the note is re-transferred to an agent of the payee." (See, also, Kont v. Bender, 25 Mich. 515, 516, et seq.; Battersbee v. Salkins, 125 Mich. 569, 572; Kollarhide v. Hopkins, 72 Ill. App. 509, 511; Pierce v. Carlton, 134 Mo. Car. 175, 177; Cline v. Templeton, 78 Ky. 553, 555; Dragon Coffee Co. v. Rogers, 105 Va. 51, 52; Elkhart State Bank v. Bristol Broom Co., 143 Va. 1, 10; Miller v. Chinn, 203 N. E. Rep., Mo. App. 212, 213.) It sufficiently appears from the evidence, and particularly from the testimony of plaintiff's witness, R. W. Gordon, as outlined in the above statement of the case, that plaintiff merely holds the note as agent for the Stearns Co. and that the latter company is the real plaintiff. Gordon stated that the plaintiff company "is an organization which is used by the Stearns Co. for the purpose of collecting their bills, notes and things of that kind - that is their regular business." It also appears that some officers of the Stearns Co. are officers of the plaintiff company and that the two companies are otherwise closely affiliated, occupying offices in the same building. The three notes were "discounted" by Stearns Co., payee of the notes, with the Denver bank before maturity. Shortly after all became due, plaintiff, agent for the Stearns Co. in collecting their bills, notes, etc., took up the notes at the bank. It is clear to us that it did so only as agent for the Stearns Co.; that the latter company, at the time of the commencement of the present action, was the real owner of the notes; and that the defense of failure of consideration is open to the defendants. For the reasons stated the judgment of the Circuit court is reversed and the cause is remanded for a new trial, and with directions to the court to allow defendants to file their said fourth additional plea of failure of consideration.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, F. J., and Scanlan, J., concur.

277 - 32218

IDA MEYERS HENNINGER,
Appellant,

v.

UNION BANK OF CHICAGO,
a corporation, trustee,
Appellee.

6697a 354
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 3, 1927, plaintiff commenced a first class action in assumpsit against defendant to recover back the aggregate sum of \$3,344.03, principal and interest, which she had paid on three installment contracts made with defendant. The cause was tried without a jury in June, 1927, resulting in the court finding the issues in favor of defendant and entering judgment against plaintiff for costs. She appealed.

The evidence disclosed that on different days in July, 1925, plaintiff entered into three agreements in writing with defendant for the purchase from it, the owner, of three vacant lots, in an unimproved subdivision in Mundelein Heights, Illinois. By the terms of each agreement it is provided that, if plaintiff (2nd party) shall first make the payments and perform the covenants thereafter mentioned on her part to be made and performed, defendant (1st part) agrees to convey to her, in fee simple and clear of incumbrances and by sufficient deed, the particular lot described; that plaintiff agrees to pay to the defendant the named price for the lot, by paying down a named sum upon the execution of the agreement, and the balance in forty named installments on the first day of each and every month thereafter, with interest at 6% per annum, payable monthly, on the whole

THE UNITED STATES OF AMERICA

VS.

JOHN EDGAR HOOVER
Special Agent in Charge
Federal Bureau of Investigation
U. S. Department of Justice

IN RE: JAMES EARL RAY, Defendant

On January 11, 1968, the following was received from the

Director of the Federal Bureau of Investigation:

Enclosed for the Bureau are two copies of a letterhead

and said of these confidential sources made with defendant.

The source who stated that he was a member of the

the court finding the James Earl Ray of defendant and ordering

largest source, defendant for costs. The enclosed.

The enclosed disclosed that on different days in July,

last, defendant, James Earl Ray, was seen in writing with

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James Earl Ray, Illinois, and the source who stated

the source who stated that he was a member of the

sum remaining from time to time unpaid, and also pay all general taxes due subsequent to the year 1924, and all special assessments, etc., levied subsequent to that year; that defendant "agrees to install, on or before June 30, 1926, water mains, sewer mains and streets at its own expense;" and that when plaintiff "has fully complied with all the terms of this contract," defendant will convey the lot to her by sufficient deed, and also furnish either a Guaranty Policy or a Torrens Certificate of Title, etc., brought down to date. In accordance with the contracts plaintiff made the stipulated monthly payments to defendant up to and including the month of May, 1926, - the last payments on all contracts being on May 6, 1926. Plaintiff testified that at that time the sewer and water mains had not been installed and the streets had not been graded; that a "man in a cage" at defendant bank, to whom she made said last payments, told her to make inquiries "up-stairs;" that she did so, and talked to "a man sitting at a desk," whose name she does not know, and that he told her "to hold off my payments until after the improvements were made;" and that thereafter, although defendant had taken steps to have the improvements made, she made no further payments. On October 30, 1926, she served three notices on defendant, to the effect that because of defendant's "failure to comply with the terms" of the contracts, she has "this day elected to rescind the same," and demands "the return of all moneys by me paid thereon." The evidence further disclosed that there was delay in completing the improvements mentioned, although defendant had acted in good faith in endeavoring to complete them; that none of them had been completed by June 30, 1926; but that at the time of the trial the water mains had been installed and were in use, the sewer mains had been constructed, and the streets had been graded but the pavements not completed.

We are not disposed to interfere with the finding and judgment of the court. Plaintiff was first in default on the contracts when she failed to make the payments due thereon on June 1, 1926. She introduced no evidence as to the man who, as she claims, told her to cease making further payments until after the improvements were made, or that he had any authority to act for or bind defendant in making such statement. And the fact that the water and sewer mains, etc., had not been installed by June 30, 1926, did not give her the right to rescind the contracts, where time is not expressly or by implication of the essence thereof, and recover back the moneys she had paid. (6 R.C.L. p. 928, sec. 312; Leints v. Hafner, 78 Ill. 27, 29; Pittenger v. Pittenger, 208 Id. 582, 592.) It may be that plaintiff, in an action for damages for the delay in installing the improvements, and upon a proper showing, could recover damages from defendant, but such is not the theory of plaintiff's action, as disclosed from her statement of claim and the evidence. She sought to rescind the contracts and recover back all moneys which she had paid thereon to defendant.

Accordingly the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

286 - 32227

EMIL BENKE,
Appellee,

v.

J. F. SCHWAB, Jr.,
Appellant.

6698a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action to recover damages sustained by plaintiff's automobile in a collision with defendant's automobile at the intersection of two streets in Chicago on November 16, 1926, there was a trial without a jury in August, 1927, resulting in the court finding defendant guilty, assessing plaintiff's damages at \$134.72, and entering judgment in that sum against defendant, who has appealed.

The collision occurred shortly after nine o'clock in the morning within the intersection of Cicero avenue (a north and south street) and Diversey avenue (an east and west street). Shortly before the collision three automobiles were approaching the intersection, - one, driven by a Mrs. Hoff and moving west on the north side of Diversey; another, owned and driven by plaintiff and moving north on the east side of Cicero; and a third, owned and driven by defendant and moving east on the south side of Diversey, near the curb. If all were near and about the same distance from the intersection, Mrs. Hoff's car had the right of way over plaintiff's, and plaintiff's car over defendant's. (Sec. 33 Motor Vehicles Act; Halmon v. Wilson, 227 Ill. App. 286, 248.) Mrs. Hoff, plaintiff's witness, testified that when her car was near the intersection she saw plaintiff's car moving north in

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Cicero, near the intersection, at a speed of about 20 miles per hour; that she yielded the right of way to it and brought her car to a full stop, facing the intersection and standing about in line with the east building line of Cicero; and that plaintiff evidently saw her car's approach to the intersection because "he slackened his speed immediately, and when he saw me stop he went ahead." Plaintiff's testimony was to the effect that, as he approached the intersection at a speed of about 20 miles per hour, his car was moving north in Cicero, straddling the outer rail of the east car track, and he checked its speed; that he looked in both directions, did not see ^{any} vehicle approaching from the west, but saw Mrs. Hoff's car approaching from the east and further checked the speed of his car and watched her car; that when he saw it come to a stop he continued on in the same direction, crossing the intersection; that when he was about half way across it he for the first time saw defendant's car, moving east, to the left of his car and four or five feet away; and that, turning his car as much to the right as he could, the two cars collided. Defendant testified to the effect that, when near the intersection and approaching it from the west on the south side of Diversey, he "blowed down to 10 or 12 miles an hour;" that he saw Mrs. Hoff bring her car to a stop and saw plaintiff's car approaching the intersection from the south and "about 75 or 100 feet" away from it; that, concluding that he had the right of way over plaintiff's car, he continued across the intersection; that when he had reached the center of Cicero he saw plaintiff's car about 12 feet away, "going about 25," and he immediately increased the speed of his car and turned slightly to the left, in order to pass in front of plaintiff's car and "avoid the accident;" that the collision occurred east of the center of

Cicero - a front part of plaintiff's car hitting "the right side of my car" and "shoving my car about 12 feet over from the center of the street to within three feet of the curb, over in the north east corner."

We do not think there is any merit in the main contention of defendant's counsel that the finding is manifestly against the weight of the evidence on the questions of defendant's negligence and plaintiff's contributory negligence. Under the conflicting evidence on material points we think that these questions were peculiarly for the court, sitting as a jury, to decide, and we see no good reasons advanced for disturbing the court's finding as to defendant's liability. (Heidler Hardwood Lumber Co. v. Wilson & Bennett Co., 243 Ill. App. 39, 95; Roth v. Fleck, 242 id. 396, 399; Harling & Co. v. Yellow Cab Co., 238 id. 326, 329.)

Defendant's counsel also contend that sufficient proof of plaintiff's damage to his car was not made and that the court erred in admitting in evidence, over objection, a certain itemized and receipted bill for \$134.72, for repairs on the car, of the Woodlawn Motor Car Sales & Service Co., the amount of which bill plaintiff testified he paid during November, 1926, after the accident. Plaintiff further testified in substance that before the accident his car was in first class condition; that as a result of the collision a fender was pushed into the radiator, the radiator coil and head lamps were damaged, the steering rods so damaged that they would not turn, the windshield broken, and the frame of the car and certain so-called horns bent; that he employed said Woodlawn Service Co. to repair the car at its place of business, and which company was engaged in the business of repairing automobiles in Chicago and known to him as being so engaged for about five years; that the company towed the car in, made the repairs on it and

of my car," said "showing up the show in fact over from the corner
at the street in front of the house, and the car was there.

rendered him the bill; and that he did not have anything repaired on the car that had not been damaged in the collision. There is nothing in the evidence, introduced by either plaintiff or defendant, or appearing from the face of the bill, to cast any suspicion on the transaction between plaintiff and the Woodlawn Service Co. In view of the recent decision of our Supreme Court in the case of Byaloe v. Matheson, 388 Ill. 269, 271, we think that plaintiff made a sufficient prima facie^{case} as to the damages he had suffered as a result of the collision, and that the trial court did not err in admitting in evidence the receipted bill.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlon, JJ., Concur.

331 - 32272

J. J. BABKA,
Appellee,

v.

HENKE-MOMOROUS COMPANY,
a corporation,
B. O. MOMOROUS and
R. W. HENKE,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 24, 1927, a judgment by confession for \$1351.25 was entered in the circuit court against defendants upon their promissory note for \$1210.43, dated October 28, 1926, payable to plaintiff's order fifteen days after date, with interest at 6 per cent per annum after date. The judgment is made up of the face amount of the note, accrued interest and attorney's fees. On March 7th, during the same term, defendants appeared and moved that the judgment be opened and that they be permitted to plead to the merits and also file a plea of set-off or recoupment, supporting the motion by the affidavit of R. F. Henke. On April 22nd, after a hearing, the court denied the motion, and the present appeal is from that order. No brief has here been filed by plaintiff.

The only questions for our determination are, whether the affidavit states such facts, distinguished from conclusions, as disclose a meritorious defense to the note, and whether the defendants have any proper claim for a set-off or recoupment. We have read the affidavit and are of the opinion that it does not sufficiently show upon its face such a defense, or any right

1008 • J. Neurosci., September 24, 2008 • 28(39):1003–1011

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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of set-off or recoupment as against the amount of the note, and that the court properly refused to open the judgment. No useful purpose will be served in here reciting the statements made in the affidavit. Accordingly, the order appealed from is affirmed.

AFFIRMED.

Barnes, P. J., and Beaman, J., concur.

It is a well-known fact that the human mind is capable of receiving and storing information in a very efficient manner. This is the reason why we are able to learn from our experiences and to use this knowledge in the future. The human mind is a very powerful tool, and it is our duty to use it to the best of our ability.

Yours faithfully,
[Signature]

340 - 32281

GEORGE RUBIN,
Appellee,

v.

JACOB GREENMAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On June 1, 1925, a judgment by confession for \$575, upon a written lease, was entered against defendant. Plaintiff claimed that there then was due him for rent under the lease \$500 - \$150 for a balance due for the month of June, 1924, and \$350 for the month of May, 1925. Attorney's fees to the amount of \$75 were included in the judgment. Subsequently, on defendant's motion and supported by his affidavit, the judgment was opened and it was ordered that said affidavit stand as an affidavit of merits. By the lease, dated March 3, 1924, plaintiff, as lessor, demise to defendant, as lessee, from April 1, 1924 to April 30, 1925, certain stores, known and numbered as 3347 and 3349 West Roosevelt road, Chicago, to be occupied for an automobile show and salesroom and automobile accessories. The lease contained the usual covenants and there was a clause providing for confession of judgment for rent due and unpaid. The defense, as alleged in said affidavit and subsequent amendments thereto, was to the effect that defendant had paid all rent due up to and including April, 1925; that he vacated the premises on April 29, 1925; that because of certain happenings, set forth in considerable detail, he was "constructively evicted" from the premises; and that he did not owe plaintiff anything for rent on the lease for the month of May, 1925, or thereafter. On May 27, 1927,

STATE OF ILLINOIS
COUNTY OF CHICAGO

JOHN J. HARRIS, JR.
Appellee,

vs.

JOHN J. HARRIS, JR.
Appellant.

MR. JUSTICE GRANT DELIVERED THE OPINION OF THE COURT.

On June 14, 1935, a judgment by confession was entered in the
Circuit Court of Cook County, Illinois, in favor of the appellee,
John J. Harris, Jr., against the appellant, John J. Harris, Jr.,
claiming that there was due him for rent under the lease 1935
- 1936 for a business and for the month of June, 1934, and 1935
for the month of May, 1935. The judgment was for the amount of
\$75.00. The judgment was entered in the judgment, respectively, of defendant
motion and supported by his affidavit, the judgment was entered
and it was entered that said affidavit stand as an affidavit of
motion. By the court, dated March 8, 1934, plaintiff, as lessee,
leased to defendant, as lessee, from April 1, 1934 to April 30,
1935, certain space, known and numbered as 1934 and 1935 and
known as "Keweenaw Road, Chicago, to be occupied for an automobile shop
and business and automobile accessories. The lease contained
the usual covenants and there was a clause providing for con-
tinuation of judgment for rent due and unpaid. The defense, as
alleged in said affidavit and subsequent amendments thereto, was
to the effect that defendant had paid all rent due up to and
including April, 1935; that he vacated the premises on April 30,
1935; that because of certain improvements, not made in conformity
with the lease, he was "constructively evicted" from the premises;
and that he did not owe plaintiff anything for rent on the lease
for the month of May, 1935, or thereafter. On May 27, 1935,

the cause was tried before a jury, resulting in a verdict that "at the date of the rendition of the judgment by confession in this cause there was due from defendant to the plaintiff the sum of \$500." After the verdict defendant, upon leave granted, filed a so-called additional plea (hereinafter referred to), which was overruled, as were his motions for a new trial and in arrest of judgment, and on July 3, 1927, the court entered judgment against defendant confirming said judgment entered by confession but only to the extent of \$500. From this judgment the present appeal is prosecuted.

It is stated in the bill of exceptions that upon the trial plaintiff made a prima facie case by introducing the lease, etc.; that thereupon defendant and his witnesses testified "relative to the claimed constructive eviction of defendant as set forth in his affidavits;" and that thereupon plaintiff and his witnesses "denied that any acts of constructive eviction had taken place." No testimony whatever is set forth in the bill, and, because of the verdict and judgment, we must presume that the evidence was insufficient to sustain defendant's said affirmative defense.

The bill of exceptions further discloses that, on June 24, 1927, while defendant's motion for a new trial was pending, he filed said additional plea (set forth in the bill) wherein he states that it is "in the nature of a plea of res adjudicata," and prays that upon a consideration thereof "judgment may be rendered for defendant non obstantes verdicto." He then avers that on June 3, 1927, in another suit between the same parties in the Municipal court, No. 1781282, brought by plaintiff against defendant to recover rent for the same premises for the month of June, 1925, and in which suit the same defense of constructive

the cause was tried before a jury, resulting in a verdict that "at the date of the rendition of the judgment by confession in this cause there was due from defendant to the plaintiff the sum of \$500." After the verdict returned, upon leave granted, filed a so-called additional plea (hereinafter referred to) which was overruled, as were his motions for a new trial and in arrest of judgment, and on July 2, 1927, the court entered judgment against defendant confirming said judgment entered by confession but only to the extent of \$500. From this judgment the present appeal is presented.

It is stated in the bill of exceptions that upon the trial plaintiff made a prima facie case by introducing the evidence that defendant borrowed and his witnesses testified "relative to the alleged constructive eviction of defendant and that he is his attorney," and that defendant admitted and his witnesses testified that any acts of constructive eviction had taken place. He took any whatever is set forth in the bill, and, because of the verdict and judgment, he must assume that the evidence was sufficient to sustain defendant's said affirmative defense.

The bill of exceptions further discloses that, on June 22, 1927, while the court's motion for a new trial was pending, he filed said additional plea (set forth in the bill) wherein he stated that it is "in the nature of a plea of assumpsit" and says that upon a consideration thereof judgment may be rendered for defendant non obstante veritate. He then states that on June 2, 1927, in another suit between the same parties in the Municipal Court, No. 172122, brought by plaintiff against defendant to recover rent for the use of premises for the month of June, 1925, and in which said the same defense of constructive

eviction was set up by defendant, there was a verdict returned against plaintiff; that on June 17, 1927, a judgment was entered thereon against plaintiff; that said judgment stands in full force and effect and unrevoked; and that the same is res adjudicata of the present suit.

The bill of exceptions further discloses that on July 3, 1927, the court considered said plea and ruled that the matters and things therein set forth "were not res adjudicata" of the present suit and entered the judgment now involved.

We are of the opinion that the court did not err in the ruling. And further discussion of the question is unnecessary because it appears from the records of this appellate court that the question is now, so to speak, an academic one. The records disclose that from said judgment rendered against plaintiff in said suit in the municipal court, No. 1731262, he perfected an appeal in this appellate court (No. 32,174); and that, on February 23, 1928, the third division of this appellate court reversed said judgment against plaintiff and remanded the cause with directions to the Municipal court to expunge said judgment from its records and to reinstate and put in full force and effect the judgment for \$400, rendered against defendant by confession on June 12, 1925, and in favor of plaintiff.

The judgment rendered by the Municipal Court in the present suit on July 3, 1927, is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

NORTHWESTERN ELECTRIC COMPANY,
a corporation,

Appellant,

v.

STUART D. BOYNTON,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On December 24, 1926, plaintiff sued defendant to recover the principal sum and accrued interest due on defendant's promissory note, dated July 28, 1926, wherein, for value received, he promised to pay to plaintiff's order \$1260, thirty days after date, with interest at six per cent per annum. The defense was that the note had been given without any good or valuable consideration and that defendant was not indebted to plaintiff. There was a trial without a jury in July, 1927, resulting in the court finding the issues against plaintiff and entering a judgment against it for costs. This appeal followed. Defendant has not filed a brief in this appellate court.

On the trial, after plaintiff had introduced the note in evidence and rested, defendant testified in his own behalf, and Samuel H. Martin, president of plaintiff, testified in rebuttal. The following facts were disclosed: In the year 1925 and prior thereto plaintiff had business dealings with the Power Equipment Company, an Illinois corporation, of which defendant was president and owner of one-half of its capital stock. The Equipment Co. gave its note for \$1260 to plaintiff for merchandise purchased. This note was renewed several times - the last one being a ninety day note for said sum due on December 28, 1925.

118 J. L. GILLESPIE AND J. H. WILSON

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[Faint, illegible text]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

THE ALLEGEDLY AS NOVEL WAS USED IN THE CASE OF THE

Beginning as President von Bismarck's chief minister, he

There was a brief meeting on July 10, 1957, resulting in the

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1. 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349

1991 1-10 10:00 AM

When this note matured defendant, as president of the Equipment Co., asked Martin to renew it, but the latter refused to do so, saying that plaintiff either wanted the note paid or a note signed by defendant, individually, in lieu thereof, to be paid within a short time. Thereupon, in consideration of the extension and the cancellation of the Equipment Co.'s note, defendant gave his individual note for said sum, bearing six per cent interest per annum from date and maturing on March 29, 1926. When this note matured defendant paid the accrued interest due thereon and gave a renewal note to plaintiff for \$1260 at the same rate of interest and maturing on June 25, 1926. Defendant did not pay this note at maturity, but on June 19th wrote Martin in part as follows: "I received your letter of the 13rd instant, enclosing notes for the old Power Equipment Co.'s indebtedness. I am enclosing check for the interest and new note for thirty days. * * I am about ready to sign a contract for a big property, and will need every dollar I can spare to get the deal started. I believe that I can give you the entire amount within thirty days, and thus get the whole matter off the books." Plaintiff accepted this renewal note for \$1260, payable to its order and due on July 26, 1926. When this note matured defendant did not pay it, but tendered the accrued interest and the renewal note, now sued upon, both of which plaintiff accepted.

Under the facts we think it clear that the note sued upon is supported by a good and valuable consideration, and, accordingly, the judgment of the Municipal court is reversed and judgment is entered here in favor of plaintiff and against defendant for the sum of \$1260, and interest on said sum from July 23, 1926, at the rate of six per cent per annum.

REVERSED AND JUDGMENT HERE AGAINST DEFENDANT.
FOR \$1260 AND INTEREST.

Barnes, P. J., and Scanlan, J., concur.

When this note matured defendant, as president of the defendant
Co., asked Martin to return it, but the latter refused to do so,
saying that plaintiff either wanted the note paid or a note
signed by defendant, individually, in like amount, to be paid
within a short time. Thereupon, in compliance with the latter
and the cancellation of the defendant Co.'s note, defendant gave
his individual note for said sum, bearing six per cent interest per
annum from date and maturing on March 27, 1936. When this note
matured defendant paid the accrued interest due thereon and gave a
renewal note to plaintiff for \$1200 at the same rate of interest
and maturing on June 28, 1936. Defendant did not pay this note
at maturity, but on June 28th wrote Martin in part as follows:
"I received your letter of the 22nd instant, enclosing notes for
the six per cent Equipment Co.'s indebtedness. I am enclosing check
for the interest and new note for thirty days. I am about
ready to sign a contract for a big property, and will need every
dollar I can spare to get the deal started. I believe that I can
give you the entire amount within thirty days, and that you will
write me off the books." Plaintiff accepted this renewal note
for \$1200, payable to its order and due on July 28, 1936. When
this note matured defendant did not pay it, but furnished the plaintiff
interest and the renewal note, now sued upon, both of which plaintiff
accepted.
Under the facts we think it clear that the note sued upon is
supported by a good and valuable consideration, and, accordingly, the
payment of the principal sum is enforceable and judgment is entered
here in favor of plaintiff and against defendant for the sum of \$1200,
and interest on said sum from July 28, 1936, at the rate of six per
cent per annum.
NEWBARD AND JOHNSON ATTORNEYS AT LAW
FOR PLAINTIFF AND DEFENDANT.
Barnes, P. J., and Corliss, J., concur.

366 - 32307

STATEMENT OF FACTS.

We find as ultimate facts in this case that defendant's note, sued upon, was executed and delivered to plaintiff for a good and valuable consideration, and that there is due from defendant to plaintiff on said note the sum of \$1260, together with interest thereon at the rate of six per cent per annum from July 28, 1926.

1910 - 1911

STATE OF TEXAS

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

My commission expires this _____ day of _____, 1911.

Witness my hand and seal of office this _____ day of _____, 1910.

Notary Public in and for the State of Texas.

271 - 32212

ERNEST SAUNDERS,
Appellant,

v.

JUNE E. OSTERBERG et al.,
Appellees.

6707385
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 16, 1916, the Stockmen's Trust & Savings Bank filed a bill in the Circuit Court of Cook County against Emilie Eastman, Frederick Eastman, June Eastman, the defendant in the instant case (now June E. Osterberg), et al., to foreclose a trust deed given by the defendants to secure the payment of \$900, evidenced by their principal promissory note dated August 23, 1907, and by six interest notes of \$27 each. The principal note was twice extended and new interest notes given on each occasion. The bill alleged that default had been made in the payment of an interest note for \$27 due August 23, 1916. The complainant in the instant case is a lawyer, and the defendant June E. Osterberg retained him as a solicitor to enter her appearance and to represent her in the foregoing proceedings. In the answer of the said defendant in that case, filed by the complainant as her solicitor, the defendant denied that default had been made in the payment of the interest note and alleged that on or about September 20, 1916, the defendant tendered to the complainant the sum of \$27 in full payment of the interest due August 23, 1916, and that the complainant refused to accept the said payment and to cancel and return to the defendant the interest coupon. On April 11, 1917, a decree of sale was

On December 18, 1914, the defendant's friend, a lawyer, bank filed a bill in the Circuit Court of Cook County against the defendant, Frederick Beckman, Jane Beckman, and defendant in the instant case (now Jane E. Gustafson), as well as to obtain a writ of habeas corpus from the defendant to secure the return of \$5000, evidenced by their original promissory note dated August 25, 1907, and by six interest notes of \$25 each. The original note was twice extended and new interest notes given on each occasion. The bill alleged that defendant had been made in the payment of an interest note for \$25 due August 25, 1913. The complaint in the instant case is a copy, and the return and Jane E. Gustafson retained him as a solicitor to enter her appearance and to represent her in the foregoing proceedings. In the answer of the said defendant in that case, filed by the defendant as her solicitor, the defendant denied that defendant had been made in the payment of the interest note and alleged that on or about September 20, 1914, the defendant tendered to the complainant the sum of \$25 in full payment of the interest due August 25, 1914, and that the complainant refused to accept the said payment and so caused her return to the defendant the interest money. On April 21, 1915, a decree of sale was

entered, and on May 3, 1917, the premises sold for \$1232.26. On August 3, 1918, the certificate of sale was purchased by the complainant in the instant case for \$1555.40, and on November 26, 1918, he assigned the certificate to the defendant and a master's deed was issued to her. At that time the defendant paid the complainant \$200 cash and executed two trust deeds, one for \$1000 and another for \$400, and at the same time the defendant and her husband executed and delivered to the complainant their two promissory notes, one for \$400 and one for \$1000, payable to the order of themselves and by them indorsed. The \$400 note was due November 27, 1919, and interest at six per cent was paid on the same to November 27, 1923. The bill to foreclose in the instant proceedings was filed February 28, 1922. The case was referred to a master in chancery and after a hearing the master reported to the chancellor that there was then due and owing to the complainant upon the \$400 note and under the terms of the trust deed, \$393.60. Certain objections to the master's report were made by the complainant and the defendants, and the same having been overruled by the master, the matter came on to be heard before the chancellor, and thereafter a decree was entered in which the total amount due the complainant was fixed at \$310.38. The complainant has prosecuted this appeal.

The complainant contends that the court erred in deducting from the amount claimed by the complainant \$175, and also in not allowing him certain credits to which he claims he was entitled. In disposing of these contentions it will be necessary to refer to certain findings of the master and the chancellor.

The master found that the complainant failed to appear before the master to whom the Stockmen's Trust & Savings Bank case had been referred and that he put in no evidence in support

entered, and on May 2, 1917, the proceeds sold for \$1,155.00. On August 2, 1915, the certificate of sale was purchased by the complainant in the instant case for \$1,550.00, and on November 18, 1915, he assigned the certificate to his defendant and a master's deed was issued to her. At that time the defendant paid the complainant \$200 cash and executed two trust deeds, one for \$1,000 and another for \$400, and at the same time the defendant and her husband executed and delivered to the complainant their two promissory notes, one for \$1,000 and one for \$400, payable to the order of complainant and by them indorsed. The \$400 note was due November 27, 1917, and interest at six per cent was paid on the same on November 27, 1920. The bill to foreclose in the instant proceedings was filed February 26, 1922. The case was returned to a master in January and after a hearing the master reported to the complainant that there was then due and owing to the complainant upon the \$400 note and under the terms of the trust deed, \$305.00. Certain objections to the master's report were made by the complainant and the defendant, and the same having been overruled by the master, the master came on to the bench before the complainant, and there after a decree was entered in which the total amount due the complainant was fixed at \$305.00. The complainant has prosecuted this appeal.

The complainant contends that the court erred in holding that the amount claimed by the complainant \$305, and also in not allowing an offset credit to which he claims he was entitled. In disposing of these contentions it will be necessary to refer to certain findings of the master and the transcript.

The master found that the mortgage name failed to appear in the deed, that the document was a Trust & Savings Bank deed and that the same had been referred and that he put in no evidence in support

of the answer of the defendant filed by him in the said cause; that he did not advise his client June Osterberg when the sale in the said case would take place and that she was thus deprived of an opportunity to bid in the property at the sale; that he did not advise June Osterberg of the status of the case until the time for redemption had expired; that a certain note for \$175 paid by the complainant in the settlement he made with the said Bank was not an obligation of the defendant June Osterberg and that the latter never authorized him to pay the said \$175; that if the complainant had advised Mrs. Osterberg as to the time of said sale she could have bid in the property "and saved the \$175.00 which the complainant afterwards paid to the said Bank," and that had he advised Mrs. Osterberg to redeem the property from the sale "he could have saved the \$175.00;" "that the complainant, Ernest Saunders, failed to do his whole duty by his client, Mrs. Osterberg, the defendant, in this cause, in that he did not put in any evidence in the Stockmen's case in support of his answer; and if he had put in some evidence and prevailed in his answer he would have defeated the foreclosure suit and saved the defendant considerable expense;" and the master found "that the said \$175.00 paid by the complainant to the Stockmen's Bank at the time he procured the Master's Certificate in said cause, should be borne by the complainant." The chancellor sustained the master in his findings as to the conduct of the complainant in the Bank case and also sustained him in reference to the \$175 note. The chancellor further found that an item of \$30 that the complainant paid the Bank as interest on the note for \$175 should be borne by the complainant; the chancellor further found that the defendant had paid to the complainant interest on \$205 (\$175 plus \$30) at the rate of six

of the answer of the defendant filed by him in the said answer
that he did not advise his client James Gustafson when the note
is the said note would take place and that the said note would
of the defendant's 1934 in the amount of \$100.00.
did not advise James Gustafson of the nature of the case until
the time for redemption had expired; that a certain note for
\$100 paid by the complainant in the settlement he made with the
note was not an obligation of the defendant James Gustafson
and that the latter never authorized him to pay the said \$100;
that at the complainant had advised Mrs. Gustafson as to the time
of said sale and could have bid in the property" and saved the
\$100.00 which the complainant afterwards paid to the said bank.
that had he advised Mrs. Gustafson to redeem the property from
the sale "he could have saved the \$100.00;" that the complainant,
James Gustafson, failed to do his whole duty by his client, Mrs.
Gustafson; the defendant, in this case, in that he did not put in
any evidence in the defendant's case in support of his answer; and
that he had put in some evidence and prevailed in his answer he would
have defeated the foreclosure suit and saved the defendant considerable
trouble and expense;" and the master found "that the said \$100.00 paid
by the complainant to the defendant's bank at the time he procured
the master's Certificate in said case, should be borne by the
complainant." The chancellor awarded the master in his findings
as to the conduct of the complainant in the bank case and also
awarded him in reference to the \$100 note. The chancellor further
found that on item of \$100 that the complainant paid the bank on
interest on the note for \$100 should be borne by the complainant;
the chancellor further found that the defendant had paid to the
complainant interest on \$100 (14% from 1934) at the rate of six

per cent from November 27, 1918, to November 27, 1923, amounting to \$61.50, and that this amount should not be borne by the defendants. We agree with the chancellor in these findings.

It appears in the evidence that on or about September 20, 1916, the defendant June Osterberg tendered to the Stockmen's Trust & Savings Bank her check, drawn on her account in that bank, for \$27, in payment of the interest due August 23, 1916; that at the time she made the tender she had on deposit in her name in that bank five or six hundred dollars; that the Bank refused to accept the check in payment of the interest note; that prior to the filing of the bill of foreclosure by the Bank Mrs. Osterberg called on the complainant in the instant case and informed him of the facts in reference to the tender, and that the complainant agreed to represent her in the matter; that Mrs. Osterberg left with the complainant the said check and that at that time there was a credit to her account in said Bank of five or six hundred dollars; that the complainant kept the check but did nothing thereafter in the way of attempting to adjust the matter with the Bank before the foreclosure suit was brought.

The complainant contends that when the defendant executed the \$1000 and \$400 notes in payment of the assignment by him of the certificate of sale, that the giving of the notes constituted an account stated, behind which the defendants cannot go. There is no merit in this contention. Under all the circumstances of this case the complainant cannot interpose the rule of law for which he contends. He knew all of the facts relating to the claim of the Bank. His client, the defendant, did not, and she trusted him, as she had a right to do, to take care of her interests. He files his claim in a court of equity and he must do equity.

The complainant further contends that if the purchase

... from November 27, 1918, to November 27, 1919, amounting to \$51.00, and that this amount should be taken by the defendant. He agrees with the chancellor in these findings.

It appears in the evidence that on or about September 20, 1918, the defendant James Gustafson tendered to the plaintiff a check for \$51.00, drawn on her account in that bank, for payment of the interest due August 22, 1918, and at that time she made the check and on deposit in her name in that bank five or six hundred dollars; that the bank had not received the check in payment of the interest note; that prior to the filing of the bill of foreclosure by the bank Mrs. Gustafson, alias on the complaint in the instant case and interest on it of the bank in reference to the check, and that the complaint agreed to represent her in the matter; that Mrs. Gustafson left with the complaint the said check and that at that time there was a credit to her account in said bank of five or six hundred dollars; that the complaint kept the check but did not cash it; that after the way of attempting to adjust the matter with the bank before the foreclosure suit was brought.

The complaint was amended so that when the defendant executed the \$1000 and \$500 notes in payment of the assignment by him of the certificate of sale, that the giving of the notes constituted an account stated, binding which the defendant cannot go. There is no merit in this contention. Under all the circumstances of this case the complaint cannot take upon the rule of law for which he contends. He knew all of the facts relating to the claim of the bank. His client, the defendant, did not, and she trusted him, as she had a right to do, to take care of her interests. He filed his claim in a court of equity and he must be satisfied.

The complaint in this case states that it was prepared

of the certificate by the complainant was improper or unauthorized by the defendants, that the defendants subsequently ratified the purchase. That we have heretofore said in reference to the last contention would seem to be a sufficient answer to the present one. We might add, however, that as the proof shows that the complainant did not disclose all the facts in reference to the settlement that he made with the Bank and that the defendant June Osterberg in acting as she did was governed by the advice of her lawyer, the complainant, the doctrine of ratification does not apply.

We have carefully studied the record in this case to determine if there was any merit in the other contentions of the complainant, and while it is probable that the complainant might, in an ordinary foreclosure proceeding, be entitled to a few small items that have not been allowed him in the decree, nevertheless, under all the facts and circumstances of this case we feel that the net amount allowed him is certainly as much as he has a right to ask equity to award him, and the decree of the Circuit Court of Cook County is therefore affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

of the certificate by the complainant, was signed by the complainant by the defendant. The defendant subsequently testified that he had not signed the certificate. What we have here before us is a reference to the fact that the complainant would seem to be a sufficient answer to the question one. We might add, however, that the fact alone that the complainant did not discuss all the facts in reference to the defendant's fact he made with the bank and that the defendant was Gotsberg in acting as and did not govern by the advice of any lawyer, the complainant, the doctrine of solicitor-client does not apply.

We have carefully studied the record in this case and determine if there was any error in the other portions of the complaint, and while it is probable that the complainant might, in an ordinary tortious proceeding, be entitled to a few small items that have not been allowed him in the decree, nevertheless, under all the facts and circumstances of this case we feel that the net amount allowed him is certainly as much as he has a right to ask equity to award him, and the decree of the Circuit Court of Cook County is therefore affirmed.

Approved.

Witness my hand and seal of office at Chicago, Illinois, this 1st day of June, 1906.

316 - 32257

CHARLES OLSON and
JENNIE L. OLSON,
Appellees,

v.

EDWARD I. EASTBURN,
Appellant.

6703-363
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Charles Olson and Jennie L. Olson, plaintiffs, sued Edward I. Eastburn, defendant, in the Municipal Court of Chicago in an action on contract. The case by agreement was tried by the court without a jury and there was a finding against the defendant, and the plaintiffs' damages were assessed at the sum of \$404. Judgment was entered on the finding and this appeal followed.

The only assignment of error argued by the defendant is that the court erred in rendering judgment for the plaintiffs and against the defendant.

The defendant, Edward I. Eastburn, and Mattie E. Eastburn, his wife, were the owners of the premises, 4649 Winthrop avenue, Chicago, Illinois, which were improved with a three-story brick building. The plaintiffs were in possession of the premises under the terms of a written lease covering a period of five years, from May 1, 1925, to April 30, 1930. Under the terms of the lease they had deposited with the defendant and his wife the sum of \$200 as security for the payment of the last month's rent. By clause twelve of the lease the lessees agreed that the lessors might terminate the lease at any time for good and sufficient reason by giving to the party of the second part ninety days' notice in writing "and the sum of two hundred dollars (\$200.00) as

224 - 225

CHARLES OLSON and
JAMES H. OLSON,
Appellants,

v.

HOWARD I. EASTBURN,
Appellee.

ALWAYS WITH THE
COURT OF CHICAGO

THE COURT GRANTED THE ORDER OF THE COURT.

Charles Olson and James H. Olson, plaintiffs, and
Howard I. Eastburn, defendant, in the Municipal Court of Chicago
in an action on contract. The case by agreement was tried by
the court without a jury and there was a finding against the
defendants, and the plaintiffs' damages were assessed at the sum
of \$1000. Judgment was entered on the finding and this appeal
followed. The assignments of error argued by the defendant
as that the court erred in rendering judgment for the plaintiffs
and against the defendants.

The defendant, Howard I. Eastburn, and Nellie E.
Eastburn, his wife, were the owners of the premises, 4449 Lincoln
avenue, Chicago, Illinois, which were improved with a three-story
brick building. The plaintiffs were in possession of the premises
under the terms of a written lease covering a period of five years,
from May 1, 1925, to April 30, 1930. Under the terms of the lease
they had deposited with the defendants and his wife the sum of \$2000
as security for the payment of the last month's rent. By clause
twelve of the lease the lessees agreed that the lessors might
terminate the lease at any time for good and sufficient reason by
giving to the lessees of the second part ninety days' notice in
writing and the sum of two hundred dollars (\$200.00) as

liquidated damages, which notice together with said two hundred dollars shall be in full of and for all damages and compensation to said party of the second part, * * It is still further mutually agreed that party of the first part will not exercise such action unless they decide to dispose of the property by sale."

The theory of fact of the plaintiff was that the defendant and his wife had an opportunity to sell the premises at a very favorable price providing that the plaintiffs would move from the premises; that the plaintiffs at the instance and request of the defendant and his wife vacated the premises on April 23, 1926; that the defendant and his wife promised the plaintiffs that they would return to them the \$400 if they would vacate; that the defendant and his wife could not sell the premises until the plaintiffs had vacated, and that after the plaintiffs had moved from the premises the defendant and his wife sold to one Henry Clark the premises for \$22,000, and that the defendant and his wife, in their dealings with the agent of Clark, stated "that the lease called for an expenditure of \$400 payable to the tenant, if the latter was to move out;" that after the plaintiffs had moved from the premises and Clark had taken possession of the same, the defendant and his wife refused to pay to the plaintiffs the \$400.

The theory of fact of the defendant was that the plaintiffs did not remove from the premises at the instance and request of the defendant and that the plaintiffs abandoned the premises on April 27, 1926, and that the defendant never terminated the lease. No point is made by the defendant that his wife was not made a party to the suit. The trial court found the issues for the plaintiffs, and after a very careful consideration of the facts and circumstances in this case we are satisfied that that finding was the only just one that could have been made.

lighted windows, which were together with the two hundred dollars shall be in full of the for all damages and compensation to said party of the second party. * * It is still further mutually agreed that party of the first part will not exercise such action unless they decide to dispose of the property by sale.

The theory of fact of the plaintiff was that the defendant and his wife had an opportunity to sell the premises at a very favorable price providing that the plaintiff could move from the premises; that the plaintiff at the instance and request of the defendant and his wife vacated the premises on April 22, 1935; that the defendant and his wife promised the plaintiff that they would return to them the \$400 if they would vacate; that the defendant and his wife would not sell the premises until the plaintiff had vacated, and that after the plaintiff had moved from the premises the defendant and his wife sold to one Henry Clark the premises for \$22,000, and that the defendant and his wife, in their dealings with the agent of Clark, stated "that the house called for an expenditure of \$400 payable to the tenant; the intent was to move out," that after the plaintiff had moved from the premises and Clark had taken possession of the same, the defendant and his wife refused to pay to the plaintiff the \$400.

The theory of fact of the defendant was that the plaintiff did not remove from the premises at the instance and request of the defendant and that the plaintiff abandoned the premises on April 22, 1935, and that the defendant never relinquished the same. He points in proof to the fact that his wife was not a party to the suit. The trial court found the issues for the plaintiff, and after a very careful consideration of the facts and circumstances in this case we are satisfied that the finding was the only one that could have been made.

The defendant contends that the plaintiffs' statement of claim was drawn on the theory that the defendant had cancelled the lease and that the burden was on the plaintiffs to prove this allegation; that "a cancellation must be in exact accordance with the printed lease," and that therefore, as the evidence shows that there was no written notice of a cancellation, the plaintiffs' case falls. It is a sufficient answer to this contention to say that it is a well-established rule of law that a condition of a contract under seal may be released by parol. (See Holf v. Ladd, 220 Ill. App. 312, 317, and cases cited therein.) Moreover, as the plaintiffs waived the formality of a written notice, and as the defendant and his wife accepted the surrender of the premises by the plaintiffs, and as the defendant and his wife for their own purpose and profit caused the plaintiffs to vacate the premises, the defendant will not now be heard to urge that the formality of the written notice was not observed.

The plaintiffs' claim is a just one and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Grisdley, J., concur.

of claim was drawn on the theory that the defendant had concealed the facts and that the burden was on the plaintiff to prove this allegation; that "a confession of guilt must be in exact accordance with the printed facts," and that, therefore, as the evidence shows that

there was no written notice of a cancellation, the plaintiff's case fails. It is a sufficient answer to this contention to say that it is a well-established rule of law that a condition of a contract under seal may be released by parol. (See Wid v. Lamm,

280 Ill. App. 315, 317, and cases cited therein.) Moreover, as the plaintiff waived the formality of a written notice, and as the defendant and his wife accepted the surrender of the premises

on the plaintiff's, and as the defendant and his wife for their own purpose and profit caused the plaintiff to vacate the premises, the defendant will not now be heard to urge that the formality of the written notice was not observed.

The plaintiff's claim is a just one and the judgment of the Municipal Court of Chicago is affirmed.

ATTORNEY.

Barnes, P. J., and Bradley, J., concur.

334 - 32275

JOHN KIRBY,
Appellee,

v.

BEN GOLDSCHLAG,
Appellant.

67 2181A.666
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Kirby, plaintiff, sued Ben Goldschlag, defendant, in the Municipal Court of Chicago in an action in tort. The plaintiff alleged that he was induced to purchase a used Maxx automobile by fraud and deceit of the defendant. There was a trial before the court with a jury and there was a verdict rendered finding the defendant guilty as charged, and assessing the plaintiff's damages at the sum of \$525. Judgment was entered on the finding and this appeal followed.

The evidence for the plaintiff supported his claim. The jury have found the issues in his favor and after a careful consideration of the evidence we feel that we would not be justified in disturbing that finding.

The defendant contends that the doctrine of caveat emptor applies to the present case. It is a sufficient answer to that contention to say that that doctrine does not apply if a case of fraud and deceit, under the law, is made out.

The defendant next contends that the contract in the instant case was reduced to writing and that all the preliminary negotiations were merged in the written contract and that as no warranty was stated in the contract the plaintiff is now precluded from asserting that there was fraud and deceit practiced in the

64817 008

Applied

COURT OF CHICAGO

THE COURT

Application

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT

...plaintiff, and the defendant, ...
in the Municipal Court of Chicago in an action to ...
plaintiff alleged that he was induced to purchase a used ...
...of the defendant. There was a ...
trial before the court with a jury and there was a verdict ...
...and a judgment ...
...of the ...
...on the ...
The evidence for the plaintiff supported his claim ...
The jury have found the facts in his favor and after a careful ...
consideration of the evidence we feel that we would not be ...
justified in disturbing that finding. ...
The defendant contends that the doctrine of ...
...is a well-settled principle. It is a well-settled principle ...
in this connection to say that the evidence does not support it ...
a case of fraud and deceit, under the law, is made out. ...
The defendant next contends that the contract in this ...
instant case was voided as existing and that all the preliminary ...
negotiations were merged in the written contract and that as no ...
variance was shown in the contract the plaintiff is not precluded ...
from asserting that there was fraud and deceit practiced in the

sale of the automobile. We find no written contract between the parties in the present case. At the time of the sale the defendant handed to the plaintiff what purports to be an invoice or bill for the automobile. This invoice or bill has neither the form nor the essentials of a written contract, but even if it could be held to be one, nevertheless, in a case of fraud and deceit a party may show the false representations that induced him to enter into the written contract.

The defendant next contends that the evidence fails to show that the alleged false representations were known to be false by the defendant and made with the intent to deceive. It is, of course, true that the plaintiff must prove that the alleged false representations were known to be false by the defendant and made with the intent to deceive, but he may establish these necessary elements in his case by direct or circumstantial evidence. The jury have found for the plaintiff in that regard and we do not feel justified in disturbing that finding.

The defendant next contends that the verdict is manifestly against the weight of the evidence. We cannot so hold.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

104-10367-10000

346 - 32287

IGNATZ SCHWARTZ,
Appellee,

v.

LOUIS HOLSMAN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE CANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff, Ignatz Schwartz, in the Municipal Court of Chicago, in an action in contract, secured a judgment by confession against the defendant, Louis Holzman, in the sum of \$1282.23 on a judgment note executed by the defendant and dated July 30, 1926. Later, on motion of the defendant, he was allowed to plead the judgment to stand as security. Thereafter, the defendant, by leave of court, filed a set-off in which he claimed that there was due him from the plaintiff, after allowing the latter all his just credits, etc., the sum of \$2534.90. The case was tried before the court with a jury and a verdict was returned finding the issues for the plaintiff and assessing his damages at the sum of \$1282.23, and further finding the issue against the defendant on his set-off. Judgment was entered on the verdict and this appeal followed.

The defendant contends that the evidence does not support the judgment. He cannot agree with this contention.

The defendant contends that the court erred in admitting certain evidence which, the defendant argues, merely tended to prove efforts by the defendant to obtain a settlement with the plaintiff. The defendant did not see fit to call our attention, in his original brief, to the evidence of which he complains. In his reply brief

1884 A. 666

APPEAL FROM JUDGMENT
GRANTED BY CIRCUIT

200 - 2000
JANUARY 20, 1900
JANUARY 20, 1900

LOUISIANA
APPEALS

THE FOLLOWING DECISIONS WERE DELIVERED BY THE COURT:

The plaintiff, James Schuster, in the Municipal Court of Chicago, in an action in contract, secured a judgment against the defendant, Louis Mahan, in the sum of \$125.00 on a judgment note executed by the defendant and dated July 30, 1900. Later, on motion of the defendant, he was allowed to amend the judgment so as to stand on security. Thereafter, the defendant, by leave of court, filed a set-off in which he claimed that there was due him from the plaintiff, after allowing the latter all his just credits, etc., the sum of \$100.00. The case was tried before the court with a jury and a verdict was returned finding the amount of the set-off to be \$100.00 and the balance due the plaintiff on his set-off. Judgment was entered on the verdict and this appeal followed.

The defendant contends that the evidence does not support the judgment. We cannot agree with this contention.

The defendant contends that the court erred in admitting certain evidence which, he claims, was merely offered to prove efforts by the defendant to obtain a settlement with the plaintiff. The defendant did not see fit to call our attention to his contention, so the evidence of which he complains. In his reply brief

he cites us one instance. This occurred during the testimony of Ignatz Schwartz. The defendant contended that the note in question was a mere accommodation paper and he denied owing the plaintiff anything on account of the note, and the court admitted the testimony in question on the ground that it tended to prove an admission by the defendant that he owed the amount of the note to the plaintiff, and that he would pay the same in installments and that he only asked for forbearance in the matter of payment. After a careful examination of the evidence in question we think the ruling of the court was correct, and while the counsel for the defendant strenuously urges in this court that the ruling of the trial court was erroneous and that the evidence in question seriously prejudiced the defendant with the jury, in the trial court the counsel made but a formal objection to the evidence and it would seem as though he acquiesced in the ruling of the court, for thereafter several other witnesses gave testimony of a like kind and without objection by the defendant.

The defendant argues at some length that the verdict is manifestly against the weight of the evidence and unjust, but after a careful examination of the record, we feel satisfied that we cannot agree with this contention.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

was after we had finished. This occurred during the testimony of
Lillian. The defendant admitted that the note in question
was a note made by her and he denied giving the witness
anything on account of the note, and the court admitted the testimony
in question on the ground that it tended to prove an admission by
the defendant that he owed the amount of the note to the plain-
tiff, and that he would pay the same in installments and that he
only asked for furtherance in the matter of payment. After a
careful examination of the evidence in question we think the
evidence of the court was correct, and while the counsel for the
defendant strenuously urged in this court that the ruling of the
trial court was erroneous and that the evidence in question
seriously prejudiced the defendant with the jury, in the trial
court the counsel made but a formal objection to the evidence and
it would seem as though he acquiesced in the ruling of the court.
For that matter several other witnesses gave testimony of a like
kind and without objection by the defendant.

The defendant argues at some length that the verdict
is manifestly against the weight of the evidence and unjust.
But after a careful examination of the record, we feel satisfied
that we cannot agree with this contention.

The judgment of the Municipal Court of Chicago is

affirmed.

APPEAL.

James, P. J., and Delaney, J., concur.

Concurring opinion.

Concurring opinion.

Concurring opinion.

Concurring opinion.

FRANK BLAKE, by his next friend
and mother, Mathilda Blake,
Appellee,

v.

CHICAGO & WEST TOWNS RAILWAY
COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Frank Blake, by his next friend and mother, Mathilda Blake, plaintiff, sued the Chicago & West Towns Railway Company, a corporation, defendant, in the Superior Court of Cook County in an action in case. There was a trial before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$10,000. Judgment was entered on the verdict and this appeal followed.

The defendant operates a double track street railway line on Lake street from Maywood to the east boundary of Oak Park. The accident in question happened on that street in the village of River Forest between 8 and 9 o'clock at night. Lake street - running east and west - is a state arterial highway upon which there is heavy traffic. The defendant operated its east bound cars on the south track and its west bound cars on the north track. At some distance east of the scene of the accident, public street improvements caused the defendant to install a temporary crossover switch by means of which it was able to operate its cars in the customary way. The progress of the improvements necessitated the moving of the crossover to a point to the west,

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and during the afternoon of the day of the accident it was removed but it was not placed in its new position until the day following the accident. The defendant operated only two cars on the Lake street line that evening and when a car was east bound it was operated on the north track. Shortly before the accident the plaintiff, a boy about sixteen years of age, met Robert Timme, about eighteen years of age, at the corner of Harlem avenue and West Lake street. The plaintiff had been to the Y. M. C. A. gymnasium and after leaving there walked with a number of boys to the point where he met Timme. Timme had with him a motorcycle that he had just bought and he invited the plaintiff to take a ride with him. The plaintiff got on the motorcycle "sitting on the gas tank; sat on left side of motorcycle with my legs hanging down resting on the footboard on left side, * * held on to sides supporting back with left hand, and held right hand up to motorcycle on brackets fastened onto frame there." Timme operated the motorcycle and they proceeded westward on Lake street. Before they reached the place of the accident the road narrowed and as cars were parked along the north side of the street Timme went onto the north or west bound car track and continued in this position until the time of the collision. There was a Ford^{coupe} going west on the same track and about fifteen feet in front of the motorcycle. From the testimony of the motorman on the car in question it appears that there was also another auto proceeding westward that was directly in front of the Ford and that just before the accident turned to the north and out of the track. Then the Ford suddenly "skidded out to the north," "slewed on two wheels," and hit the north curb; the street car "just missing the rear fender of the Ford." As the Ford turned to the north the plaintiff saw the street car for the first time. It was then about fifteen

and during the afternoon of the day of the accident it was not
moved but it was not placed in its new position until the day
following the accident. The defendant operated only two days
on the lake during the evening and when a car was used
found it was operated on the north bank. Shortly before the
accident the plaintiff, a boy about thirteen years of age, was
Robert Tinner, about thirteen years of age, at the corner of
Main avenue and East Lake street. The plaintiff had been so
the T. M. O. A. Gymnasium and after leaving there walked with a
number of boys to the point where he met Tinner. Tinner had with
him a motorcycle but he had just parked and he invited the plain-
tiff to ride with him. The motorcycle was in the plaintiff's
left hand and he was riding on the road on the left side. The
on the right side of the road with left hand, and both right hand up
to motorcycle on the right side of the road. Tinner
operated the motorcycle and they proceeded toward on Lake street.
Before they reached the place of the accident the road narrowed
and as they were going along the north side of the street Tinner
went into the ditch or went down on the bank and continued in this
position until the time of the collision. There was a very
good view of the lake from about fifteen feet in front of the
motorcycle. From the testimony of the witnesses on the car it
appears to appear that there was also another man proceeding
westward that was directly in front of the lake and that just before
the accident turned to the north and on of the bank. When the
Tinner was only "started out as the motor" "started on the motor".
The car the motor started the motor and "Tinner was in the road"
Tinner of the road. In the road turned to the north and the plaintiff
and the motor and for the first time. It was then about fifteen

or eighteen feet in front of the motorcycle and the plaintiff yelled a warning to Timme and the latter attempted to turn to the north, but a collision occurred between the street car and motorcycle. The plaintiff sued to recover damages for injuries sustained in this accident. The plaintiff was unconscious for two weeks thereafter and eight months elapsed before he left the hospital. Each of his legs was broken in several places below the knee and his collar bone on each side was fractured. His general condition after the accident was such that the attending physician deemed it unsafe to attempt to set or reduce the fractures, and it is clear that the plaintiff sustained serious and permanent injuries as the result of the accident, but as the defendant has not seen fit, in its brief, to question the amount of the verdict we do not deem it necessary to further detail the injuries or the results that followed.

The defendant contends that "the court should have directed a verdict for defendant on the evidence" because "the record shows no evidence of due care" and "it affirmatively shows contributory negligence." The defendant in support of this contention argues that "it is highly dangerous to ride in the night time on a motorcycle gas tank sitting sideways in front of the driver and holding on to part of the framework of the handlebars, in that manner obscuring the driver's vision, interfering with the operation of the motorcycle, making escape almost impossible in event of danger," and that the plaintiff should have cautioned Timme not to drive too closely to the Ford, and, further, that he should have warned him of the approach of the street car in time to have permitted the latter to avoid the collision. As to the contention that the plaintiff should have warned Timme in time to avoid the accident, it appears in the

at 11:15 p.m. in front of the residence and the plaintiff
 called a witness to the fact and the latter testified to him to
 the fact, but a collision occurred between the two cars, and
 the plaintiff was injured. The plaintiff sued to recover damages for injuries
 sustained in this accident. The plaintiff was unconscious for
 two weeks thereafter and eight months elapsed before he left the
 hospital. None of his legs was broken in several places below
 the knee and his collar bone on each side was fractured. His
 general condition after the accident was such that the attending
 physician deemed it unsafe to attempt to get on his feet the
 following day, and it is shown that the plaintiff sustained serious
 and permanent injuries as the result of the accident, and on the
 defendant has not been able, in the brief, to question the accuracy
 of the verdict we do not deem it necessary to further detail
 the injuries on the plaintiff's behalf.

The defendant contends that the plaintiff's injuries
 resulted from a collision between the two cars, and that the plaintiff
 should have no recovery of damages, and "it is respectfully
 requested that the defendant be granted judgment." The defendant in support of
 this contention argues that "it is highly probable to hold in
 the night time on a highway that such driving is always in front
 of the driver and holding on as part of the team of the
 defendant, in that manner obstructing the driver's vision, thereby
 forcing with the operation of the motor vehicle, making every minute
 impossible in event of danger," and that the plaintiff should
 have maintained them not to drive too closely to the front, and
 further, that he should have warned him of the approach of the
 plaintiff as he had permitted the latter to avoid the
 collision. As to the contention that the plaintiff should have
 warned them in time to avoid the accident, it appears in the

proof that just prior to the collision, the motorcycle was about fifteen to eighteen feet directly in the rear of the Ford and following it when suddenly the Ford "skidded out to the north," made a sharp turn "almost on two wheels, and hit the north curb," the street car "just missing the rear fender of the Ford." The plaintiff testified that he did not know that the defendant was using the north track for east bound traffic and that when the Ford turned to the north he saw the street car for the first time; that it was then fifteen or eighteen feet in front of the motorcycle "and coming;" that he then yelled to Timme, "Look out, the street car;" that Timme attempted to turn north but had not time to make the clear when the collision occurred. The motorman admitted that he did not see the motorcycle until the Ford turned to the north and the defendant concedes that the car was "quite close" to the Ford as it turned to the north, and therefore it seems reasonably clear that the plaintiff, in the exercise of ordinary care, had not sufficient time to warn Timme so that he might have turned the motorcycle out of the track. As the defendant's cars were ordinarily operated in an easterly direction on the south track, the plaintiff had a right to assume, at least up to the time when he could observe to the contrary, that the usual custom was being followed. Certainly, it cannot be held as a matter of law that the plaintiff was guilty of negligence for assuming that the defendant would follow its usual custom on the occasion in question. (See Tiley v. Detroit United Ry., 190 Mich. 7.) That the car was proceeding easterly on the east bound track was a circumstance that bore upon the question whether the motorman was in the exercise of ordinary care at the time of the accident and also upon the question of the carefulness or negligence of the plaintiff. (North Chicago Street R. R. Co. v. Irwin, 202 Ill.

great that just prior to the collision, the motorcycle was about
 fifteen to eighteen feet directly in the rear of the Ford and
 following it when suddenly the Ford "skidded out to the north,"
 made a sharp turn "almost on two wheels, and hit the north curb,"
 the street car "just missing the rear bumper of the Ford." The
 plaintiff testified that he did not know that the defendant was
 using the north track for east bound traffic and that when the
 Ford turned to the north he saw the street car for the first time
 that it was then fifteen or eighteen feet in front of the motor-
 cycle "and coming," that he then yelled to "Timmy," "Look out,"
 "the street car," that he attempted to turn north but had not
 time to make the clear when the collision occurred. The motor-
 cycle testified that he did not see the motorcycle until the Ford turned
 to the north and the defendant conceded that the car was "quite
 close" to the Ford as it turned to the north, and therefore it
 seems reasonably clear that the plaintiff, in the exercise of
 ordinary care, but not ordinary care as a motorist, as the defendant
 might have turned the motorcycle out of the track, as the defendant
 and a car were suddenly appeared in an easterly direction on
 the south track, the plaintiff had a right to assume, as laid up
 at the time when he could observe to the contrary, that the motor-
 cycle was being followed. Certainly, it cannot be held as a
 matter of law that the plaintiff was guilty of negligence for
 assuming that the defendant would follow the usual custom on the
 occasion in question. (See Tilly v. Barrett United Ry., 120 Mich.
171). That the car was proceeding easterly on the west bound track
 was a circumstance that bore upon the question whether the motor-
 cycle was in the exercise of ordinary care at the time of the
 collision and also upon the question of the carelessness or negligence
 of the plaintiff. (Barrett v. Tilly, 120 Mich. 171.)

345, 347.) As to the contention that the plaintiff was negligent in riding on the motorcycle as he did: In Pope v. Halpern, 193 Calif. 168, the deceased, a boy, was seated on the rear fender, immediately behind the driver's seat, his legs on the left side, his left foot holding onto the rod which supports the seat, his left hand resting in his lap, and it was there held that the question as to whether or not the deceased was negligent in thus riding on the motorcycle was one for the jury. In Linehan v. Morton, 221 Ill. App. 70, 72, this branch of the court held that it was not negligence per se as a matter of law for the deceased to have propelled his bicycle while another boy was riding on its handlebars. That case is an authority against the defendant's instant contention. The case of Simpson v. Mollenburg, 96 N. J. Law Rep. 518, 520, directly answers the contention of the defendant that the plaintiff was guilty of negligence in not warning Timme that he was following the Ford too closely. It is there said: "For the appellants it is strenuously urged that the plaintiff by riding behind the moving truck within a distance of eight to twenty feet was guilty of negligence per se. The adoption of such a view would result in disastrous consequences to public travel, by preventing the free use of our public roads for all kinds of vehicular traffic and materially impede the proper running of vehicles for both business and pleasure. For it is a matter of common knowledge that conditions of traffic often become such that vehicles are necessarily much closer to each other than eight feet, and, therefore, must be run and guided as to their speed by the vehicles ahead, and to denounce such conduct as negligent per se cannot be justified in good sense. The mere fact that a vehicle is moving in close proximity to a moving vehicle ahead and keeping up with it does not of itself constitute

negligent conduct per se." "The general public have the right to use and travel upon the entire street, including that portion of it on which the car tracks are laid." (Swanson v. Chicago City Ry. Co., 242 Ill. 393, 392.) In connection with the present contention it will be noted that the plaintiff testified that "as we came to this viaduct, the road narrows there, and there was cars parked along the north side of the street there, and so we went onto the car tracks." The question of contributory negligence is ordinarily a question of fact for the jury and it only becomes a question of law where the undisputed evidence is so conclusive that the court could arrive at no other conclusion than that the injury was the result of negligence on the part of the party injured. (Chicago City Ry. Co. v. Nelson, 215 Ill. 436, 440.) If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. (*Ibid.*) The jury have found that the plaintiff was in the exercise of ordinary care for his own safety at the time of and just prior to the accident in question, and we feel that we would not be justified in disturbing that finding.

The defendant, under the present contention, seems to argue, at times, that the plaintiff has failed to prove by a preponderance of the evidence that the defendant was guilty of negligence. The theory of fact of the plaintiff was that the operating of the street car in an easterly direction on the north track was contrary to the defendant's usual custom, and that the servants of the defendant were aware of the danger in so doing; that the accident occurred on a state arterial highway, viz., Lake street, in the village of River Forest, and at night; that this street had a heavy traffic; that the motorman admitted that

The following are the names of the persons who were present at the meeting held on the 1st day of January, 1908, at the residence of Mr. J. H. Smith, located at No. 123 Main Street, New York City.

Mr. J. H. Smith
Mr. A. B. Jones
Mr. C. D. Brown
Mr. E. F. Green
Mr. G. H. Black
Mr. I. K. White
Mr. L. M. Gray
Mr. N. O. Blue
Mr. P. Q. Red
Mr. R. S. Yellow
Mr. T. U. Purple
Mr. V. W. Pink
Mr. X. Y. Orange
Mr. Z. A. Silver

the west bound traffic was "pretty thick" as he approached the place of the accident; that the motorman failed to sound the gong as the car proceeded along the street and approached the place in question; that the speed of the car, under all the circumstances, was not warranted; that the motorman, as he approached the place of the accident, saw at least two automobiles proceeding westward on the north track; that he saw the first one turn to the north and leave the track as the car got close to it; that he then saw the Ford in the car track, and that during all this time he did not stop or slow down the car and that it was in motion at the time of the collision and ran about twelve feet thereafter before it came to a stop. The plaintiff's theory of fact was supported by evidence, and the jury by their verdict found that the defendant was guilty of negligence, and we are satisfied that we would not be warranted in disturbing that finding. We are entirely unable to agree with the argument of the defendant that the fact that the street car was proceeding, contrary to custom, in an easterly direction on the west bound track, played no material part in the accident. In our judgment it is a very important circumstance in the case. (See North Chicago Street R. R. Co. v. Irwin, supra.) It was night and the motorman knew that "pretty thick" traffic was moving westward on the north track and it was therefore necessary for him to observe a higher degree of care and caution than would be the case if the car were being operated on the usual track. As is customary in this class of cases, there was a controversy in the evidence as to whether the car was moving or had stopped at the time of the accident and also as to whether the motorman rang the gong as he approached the place in question. These questions have all been settled by the verdict of the jury

and we see no good reason to disturb the finding of the jury in reference thereto.

The defendant contends that the plaintiff must be considered as a joint operator of the motorcycle and not as a passenger or invited guest, and that therefore the court erred in giving to the jury plaintiff's instruction number 6. This instruction (inter alia) told the jury that the negligence, if any, of Timme in operating the said motorcycle would not alone bar a recovery by the plaintiff. The defendant concedes that a passenger or guest in an automobile or wagon, or other similar vehicle driven on four wheels, is not chargeable with the driver's negligence, but it argues that the rule should be different in a case where a motorcycle is involved. As we understand the argument of the defendant it amounts to this, that the position of the plaintiff on the motorcycle affected the management and operation of the car and that therefore the plaintiff must be considered as a joint operator of the same. The defendant cites no authority in support of this contention. In the case of Pope v. Halpern, supra, a motorcycle case, a similar contention was raised and it was there held that the operator of the motorcycle and the decedent, a guest, were not engaged in such a joint enterprise as to bring decedent within the rule of imputable negligence, nor were they in the joint or common possession of the motorcycle. That the position of the plaintiff on the motorcycle in question would require the exercise of greater care on the part of Timme in controlling the motorcycle may well be conceded, but we fail to find anything in the evidence that would warrant the conclusion that the plaintiff was jointly engaged in the operation of the motorcycle.

What we have said in reference to the last contention, if our conclusion is correct, would make it unnecessary to refer specifically to the complaint of the defendant that certain instructions given for the plaintiff are predicated upon the theory that the plaintiff was a passenger or invited guest

The defendant contends that the plaintiff was not
considered as a joint operator of the motorcycle and not as a
passenger or invited guest, and that therefore the court erred in
giving to the jury plaintiff's instruction number 2. This in-
struction (which also) told the jury that the negligence, if any,
of time in operating the said motorcycle would not alone bar a
recovery by the plaintiff. The defendant contends that a passenger
or guest in an automobile or wagon, or other similar vehicle driven
on town streets, is not chargeable with the driver's negligence,
but is saying that the rule should be different in a case where a
motorcycle is involved. As we understand the argument of the
defendant it amounts to this, that the position of the plaintiff
on the motorcycle affected the management and operation of the car
and that therefore the plaintiff must be considered as a joint
operator of the same. The defendant also no authority is shown
to that effect. In the case of *Johnson v. Johnson*, 100
motorcycle was, a similar contention was raised and it was there
held that the operator of the motorcycle and the driver, a horse,
were not engaged in such a joint enterprise as to bring defendants
within the rule of negligence upon whom, now were they in the
joint or common possession of the motorcycle. That the position
of the plaintiff on the motorcycle in question could render the
exercise of greater care on the part of time in controlling the
motorcycle may well be conceded, but we fail to find anything in
the evidence that would warrant the conclusion that the plaintiff
was jointly engaged in the operation of the motorcycle.
That we have said in reference to the last contention,
if our conclusion is correct, would make it unnecessary to refer
specifically to the complaint of the defendant that certain
instructions given for the 1st and 2nd were prohibited upon the
theory that the plaintiff was a passenger or invited guest

on the motorcycle. We might add, however, that defendant's given instruction number 5 also assumed that the plaintiff was a passenger on the motorcycle and therefore the defendant is in no position to complain of a supposed vice in instructions given on behalf of the plaintiff when a like error appears in an instruction given at its own request. (West Chicago Street R. Co. v. Buckley, 208 Ill. 360; Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207; Mowery v. City, 245 Ill. App. 358, 343.)

The defendant next contends that plaintiff's given instructions numbers 2, 3 and 4 assume that the street car was moving at the time of the accident and that as this was a controverted question it was error to give these instructions. In Reivitz v. Chicago Rapid Transit Co., *supra*, our Supreme Court used the following language: "The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions." We feel that this language aptly applies to the present contention. The particular criticism that the defendant makes is that the use of the words "the approach of said street car" amounts to an assumption that the car was moving at the time of the accident. We do not think that this language, when it is considered in the light of the subject matter to which it applies, will bear any such interpretation. The language complained of refers to the duty of the plaintiff to use "reasonable and prudent efforts to observe and avoid danger and to warn the operator of said motorcycle thereof," and it requires the plaintiff to use care not only at the exact time of the accident but just prior thereto. We think that the objection to the instructions in question is hypercritical.

The defendant next contends that the court erred "in

on the motorcycle. To night and, however, that defendant's given
instruction number 3 also states that the plaintiff was a
passenger on the motorcycle and that the defendant is in no
position to complain of a supposed error in instructions given on
behalf of the plaintiff when a like error appears in an instruction
given as its own command. (That instruction is in the
200 Ill. 2d, People v. Chicago Police Officers, 197 Ill. 2d 107.
People v. City of Chicago, 197 Ill. 2d 107, 342.)
The defendant now contends that plaintiff's given
instruction number 2, 3 and 4 require that the motorist was
moving at the time of the accident and that on this was a mistake.
versed question it was never to give these instructions. In People
v. Chicago Police Officers, our Supreme Court used the
following language: "The case, then, is not what meaning the
ingenuity of counsel can at last find to the instructions,
but how and in what sense, under the evidence before the jury and the
circumstances of the trial, ordinary men and laymen would
understand the instructions." We find that this language applies
equally to the present contention. The plaintiff's criticism that
the defendant failed to show the use of the words "the operator of
said motorist was" answers to no suggestion that the car was moving
at the time of the accident. We do not think that this language,
when it is considered in the light of the subject matter to which
it applies, will bear any such interpretation. The language
contained at least to the effect of the plaintiff to the "reasonable
and prudent efforts to observe and avoid danger and to warn the
operator of said motorcycle thereof," and it requires the plaintiff
to use care not only at the exact time of the accident but that
prior thereto. We think that the objection to the instructions in
question is hypercritical.
The defendant now contends that the court erred in

refusing to permit the introduction of evidence showing that the motorman was a competent employee." The defendant cites in support of this contention Lake Street Elevated R. Co. v. Fitzgerald, 112 Ill. App. 312; Western Stone Co. v. Whalen, 151 Ill. 472; C., L. S. & E. Ry. Co. v. Hartmann, 71 Ill. App. 437. In each of these cases it will be found that the declaration charged the defendant with negligence in employing an incompetent man. In the declaration in the instant case no such charge is made. On the cross-examination of Johnson, the motorman, he answered that he was an extra motorman and had been employed in that capacity by the defendant from April to the time of the accident, and the defendant insists that the plaintiff by bringing out the fact that Johnson was an "extra" motorman, gave it the right to introduce evidence that the motorman was a competent employee. We find no merit in this contention.

The defendant next contends that the court erred in denying its motion to strike out two answers of Dr. French in which the witness made an estimate of the disability of the right leg of the plaintiff. The answers in question were made on the direct and the defendant at the time made no objection to the same, nor did it then make a motion to strike them. At the conclusion of the cross the defendant made a motion to strike the answers on the ground "that they are mere statements of conjecture." We are inclined to the opinion, in view of the entire cross, that the motion should have been granted, but the error is not of an important character as the defendant in its brief has not argued or even raised the point that the amount of the verdict is excessive, and we are satisfied from undisputed evidence showing the serious and permanent injuries suffered by the plaintiff, that the amount allowed in the verdict is not excessive.

The defendant next contends that the court erred in excluding the testimony of an expert witness as to how quickly the motorcycle could have been turned out of the street car track. Earl Olson, an expert in the handling of motorcycles, was called by the defendant and was asked in what distance a motorcycle in good operating condition going fifteen or sixteen miles an hour could be turned out of a street car track, and he replied: "That would depend, of course, upon the width they have to turn. The wider the distance they have to turn out, - that would greatly help it. Q. Well, assuming the distance that they have to turn out is more than half the width of the street car? Mr. Walker: I object to the form of that question. The Court: Objection sustained. Mr. McEwen: Exception. Q. Assume there is nothing in front of the motorcycle in question, how quickly could it turn out from the center of the street car tracks? Mr. Walker: I object to that. The Court: Objection sustained. Mr. McEwen: Exception." The defendant now contends that the court should have allowed the questions to be answered. The plaintiff contends that the form of the questions, in view of the answers that has been theretofore given by the witness, was bad and that the questions called for answers as to how quickly an "expert" could turn out and that this is not the test, citing Hiller v. Everole, 184 Ill. App. 362, and other cases. But, disregarding entirely the points raised by the plaintiff in opposition to the present contention, and others that might be raised, we are unable to see how the defendant can reasonably contend that it was injured by the rulings of the trial court. The plaintiff testified on cross-examination that the motorcycle could be turned out in six or seven feet, and as the defendant made no offer to show by the witness Olson that the motorcycle

could be turned out in a less distance, we fail to see any merit in its present contention.

The defendant next contends that the court erred in refusing to give to the jury defendant's instruction 9 refused. That instruction reads as follows: "If the motorcycle was driven at a speed which under all the facts and circumstances of the case was negligent, and the plaintiff did nothing to warn the driver of the motorcycle of the danger of operating the same at such speed, and but for such speed the accident would not have happened, then the plaintiff cannot recover, regardless of whether the defendant company was negligent or not." It is fundamental law that the jury should be instructed to find the facts from the evidence alone and this instruction is defective in that regard. It, a mandatory instruction, is also defective in that it does not require the jury to find that the failure of the plaintiff to warn the driver of the motorcycle of the danger of operating the same at such speed, if they so found, was negligence on his part. The instruction is otherwise defective.

The defendant next contends that the court erred in refusing to give to the jury defendant's refused instructions 1, 2, 4, 5, 6, 7, 10 and 12. The defendant makes a blanket complaint as to the action of the court in reference to these instructions, but has failed to state any reasons why the same should have been given to the jury. Therefore, we do not consider it our duty to further notice this contention.

The defendant next contends that the court erred in refusing to give to the jury defendant's refused instruction 8, which reads as follows: "If you find from the evidence that the plaintiff saw, or could in the exercise of ordinary care have seen, the street car in time to have warned the driver of the motorcycle and turned out or stopped to avoid the collision, then it makes

no difference whether the motorman of the street car rings a bell or not." It is apparent that this instruction was inaccurately drawn. The subject of the verbs "turned" and "stopped" is "plaintiff." The plaintiff was not driving the motorcycle and could not have "turned out or stopped" the same.

The defendant next contends that the court permitted the counsel for the plaintiff to make improper argument to the jury. The first statement complained of is as follows: "Our statement of claim, declaration, is for \$35,000. Somebody might say, 'Well, that is too much;' or, 'is too little.' In these days remember a Dollar is not what it used to be. Mr. McEwen: I want an exception to that argument, your Honor, 'a dollar is not what it used to be.' Mr. Walker: In value, I am talking about." As the defendant did not ask the court to rule on the statement it is in no position to complain, but, in any event, there was nothing harmful in the statement and the appellate courts of this state have frequently had occasion to state that the value of the dollar today is not what it was some years ago. Counsel for the plaintiff, in his argument, in referring to the testimony of Mr. Vols, said: "He said he saw it coming and absolutely no bell was rung. Mr. McEwen: Excuse me. He said he didn't hear it. Mr. Walker: No, he says there was absolutely no bell rung. The Court: Go ahead. Mr. McEwen: Exception, by defendant." The defendant did not make any objection to the statement of the counsel for the plaintiff. He merely gave his version of the evidence. The court was not called upon to rule in the matter and the defendant is in no position to complain.

We have very patiently and carefully considered the many contentions raised by the defendant on this appeal. In our judgment the defendant has had a fair and impartial trial and the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Griskey, J., concur.

378 - 32319

JOHN MOLONEY,
Appellant,

v.

FREDERICK ARND,
Appellee.

6707a
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SWANLAN DELIVERED THE OPINION OF THE COURT.

John Moloney, plaintiff, sued Frederick Arnd, defendant, in the Superior Court of Cook County in an action in assumpsit. The case was tried before the court with a jury and a verdict was returned finding the issues for the plaintiff and assessing the plaintiff's damages at the sum of \$2008.86. Thereupon the defendant filed a written motion for a new trial and the court thereafter granted the same, and then the court on motion of the defendant entered a judgment non obstante veredicto in favor of the defendant for costs. This appeal followed.

The plaintiff contends that when a trial court grants a new trial the case must be tried de novo. This contention is, of course, meritorious. (See Indiana Harbor Belt R. Co. v. Green, 289 Ill. 61, 85; Brenner v. Coorber, 43 Ill. 497; Travers v. Wormer, 13 Ill. App. 39, 42. The plaintiff ^{further} contends that a judgment non obstante veredicto cannot be entered on motion of a defendant. While our conclusion as to the first contention makes it really unnecessary for us to pass upon the second contention, nevertheless, we might add that it is also meritorious. (See The Tribune Co. v. The Dunlap Mfg. Co., 201 Ill. App. 408, and cases cited therein.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.
REVEREND AND HONORABLE.
Barnes, P. J., and Gridley, J., concur.

666

374 - 12312

JOHN HOLMES, Appellant.

VERMILION ARND, Appellee.

THE JUDICIAL BRANCHES - OPINION OF THE COURT

John Holmes, plaintiff, sued Vermlion Arnd, defendant, in the Superior Court of Cook County in an action for damages. The case was tried before the court with a jury and a verdict was returned finding the defendant liable for the plaintiff's damages in the sum of \$2000.00. Thereupon the defendant filed a motion for a new trial and the court, after hearing the facts, and upon the basis of the evidence, granted the motion and set aside the verdict in favor of the defendant. This appeal follows.

The plaintiff contends that when a trial court grants a new trial the case must be tried de novo. This contention is, in fact, correct. (See People v. People, 111 Ill. 2d 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

387 - 32328

JOSEPH ISAAC,

Appellee,

v.

ABE BENKOWSKY,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Joseph Isaac, plaintiff, sued Abe Benkowsky, defendant, in the Municipal Court of Chicago in an action in contract. The case was tried before the court without a jury, and there was a finding in favor of the plaintiff and his damages were assessed at the sum of \$300. Judgment was entered on the finding and this appeal followed. The common law record is all that has been filed in this court.

"Plaintiff's claim is for liquidated damages and attorney's fees because of the defendant's refusal to allow access to the store floor of the premises commonly known as 1253 S. Kedzie avenue, Chicago, Illinois, in accordance with the terms of a lease dated September 3, A. D. 1924, entered into between the plaintiff as lessor and the defendant as lessee, for the aforesaid premises, a copy of which lease is attached hereto and made a part of this Statement of Claim." The lease contained (inter alia) the following provisions:

"Lessee shall allow Lessor, his agents, employees or servants, or any other person thereunto authorized by lessor, free access to the premises hereby leased for the purpose of examining the same, to ascertain if the same are in good repair and in a clean, sightly and healthy condition, and to make such repairs or alterations as Lessor may see fit to make, and to exhibit the same to prospective purchasers of the building in which said premises are contained, and to prospective tenants in the place of Lessee, and for the last mentioned purposes to allow to be placed in and upon said premises, at such

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placed as may be directed by Lessor, notices of 'For Rent'; and Lessee undertakes and agrees that neither he nor any person within his control will interfere with said notices when thus placed. Lessor shall have the right of access herein mentioned with or without Lessee's consent. If Lessee or any person under his control, shall refuse or fail to allow access to said premises as in this paragraph provided, or to allow the placing of any 'For Rent' notice as in this paragraph provided, or shall interfere with any such notice, he shall pay to Lessor, as liquidated damages and not a penalty, for each such violation a sum equivalent to three months' rent, it being recognized that the actual damages caused by such violations, while real and substantial are very difficult, if not impossible, of ascertainment. * * *

"Lessee shall pay and discharge all costs, expenses and attorney's fees, which shall be incurred and expended by Lessor in enforcing the covenants and agreements of this lease, whether by the institution of litigation or in the taking advice of counsel, or otherwise."

The term of the lease expired April 30, 1927, and the plaintiff alleges in his statement of claim that in January, 1927, "the defendant served notice upon the plaintiff that he, the said defendant, regarded the lease as terminated as of the 30th day of April of this year; that within a short time previous to giving the said notice, the defendant removed the greater part of his possessions in the leased premises to another store in the immediate vicinity at which place he is now conducting his business; that the defendant after so removing his possessions from the demised premises, placed a padlock upon the door of said demised premises and retained the keys to said padlock;" that on March 1, 1927, and repeatedly thereafter, the plaintiff requested of the defendant the keys for the premises for the purpose of obtaining access to the premises that he might alter and repair the same so as to make them fit for a prospective tenant who might occupy the premises after May 1, 1927, and that the defendant refused to turn over the keys for such purpose; that the plaintiff has requested of the defendant the keys to the premises and access

place as may be discussed by parties, parties in
'For Rent'; and license restrictions and other such
notwithstanding he nor any person within his control will
interfere with said parties from this license. License
shall have the right to access herein mentioned with
or without license a contract. It is noted on any person
under this contract, shall release or fail to allow access
to said premises as in this paragraph provided, or to
allow the signing of any 'For Rent' notice as in this
paragraph provided, or shall interfere with any such
notice, he shall pay to licensee, as liquidated damages
and not a penalty, for each such violation a sum
equivalent to three months' rent, it being recognized
that the actual damages caused by such violations,
while real and substantial are very difficult to estimate,
possible, or ascertainable.

Licensee shall pay and discharge all taxes, expenses
and attorney's fees, which shall be incurred and expended
by licensee in enforcing the covenants and conditions of
this license, whether by the institution of litigation or
in the taking action of summary or otherwise.

The term of this license expired April 30, 1937, and the plaintiff

alleges in his statement of claim that in January, 1937, the

defendant served notice upon the plaintiff that he, the said

defendant, regarded the lease as terminated as of the 30th day

of April of this year; that within a short time plaintiff

removed the said building, and removed the personal property

of his possessions in the leased premises to another place in the

immediate vicinity of which place he is now conducting his business;

that the defendant after so removing his possessions from the

leased premises, failed to return upon the same the same

premises and the same to the plaintiff, and on April 1,

1937, and repeated thereafter the same to the plaintiff

defendant the keys for the premises for the purpose of obtaining

access to the premises that he might obtain and regain the same as

he is now doing for a period of five years and at every time

premises after May 1, 1937, and the defendant is refused to

return over the keys and premises; that the plaintiff has

repeatedly of the defendant the keys to the premises and

to the same for the purpose of placing "For Rent" signs in said store floor, and that the defendant refused to turn over the keys or give access to the premises to the plaintiff for said purpose; that since March, 1927, the plaintiff has frequently requested the defendant to allow him to show the premises to various persons for the purpose of renting the same for occupation and possession after May 1, 1927, and that the defendant has always refused such request; that because of the refusal or failure of the defendant to allow the plaintiff access to the premises "he is entitled to liquidated damages as set out in the lease attached hereto in the sum of Seven Hundred Fifty (\$750.00) Dollars," and that he is entitled to the sum of \$100 as costs, expenses and attorney's fees in the enforcement of the covenants of the lease.

The defendant's sole contention is that "the provisions of the lease in this case that the tenant pay three months' rent as liquidated damages for each violation of the provisions thereof should be construed as a penalty, and actual damages should have been alleged" in the statement of claim, and that because of the failure of the plaintiff to allege actual damages the plaintiff failed to make out a prima facie case in his statement of claim, and that therefore the defendant's motion in arrest of judgment should have been sustained. The case of Weiss v. United States Fidelity Co., 300 Ill. 11, holds adversely to this contention. In that case the court said: "Where a contract provides for liquidated damages at so much per day for delay in the performance of the building contract beyond the time fixed for completing the building, as this contract does, it is not necessary in an action for breach to allege actual damages from such delay, as plaintiff is entitled to rely on the contract to show that damages at the

to the sum for the purpose of paying the balance of the debt in full
and that the defendant refused to pay over the
money on five occasions in the period of the plaintiff's
purpose; that since March, 1937, the plaintiff has repeatedly
requested the defendant to allow him to have the proceeds of
various payments for the purpose of paying the same for attorney
and possession after May 1, 1937, and that the defendant has always
refused such request; that because of the refusal of the defendant
the defendant is allowed to allow the plaintiff access to the proceeds of
the sale of the property and to the proceeds of the sale of the property
and that he is entitled to the sum of \$100 as costs, expenses and
attorney's fees in the enforcement of the provisions of the lease.
The defendant's sole contention is that "the provisions
of the lease in this case that the tenant pay 'rent' only
as liquidated damages for each violation of the provisions thereof
should be construed as a penalty, and actual damages should have
been allowed" in the statement of claim, and that because of
failure of the plaintiff to allege actual damages the plaintiff
failed to state his claim. The court in its statement of claim
and that therefore the defendant's motion in arrest of judgment
should have been sustained. The case of Wright v. Wright
1934 Ky. 11, 12, which adversely so held is distinguished.
In that case the court said: "where a contract provides for
liquidated damages at so much per day for delay in the performance
of the building contract beyond the time fixed for completion the
building, as this contract does, it is not necessary in an action
for breach to allege actual damages from such delay, as liability
is established as well as the contract is when the damages of the

rate stipulated will result from the breach. The burden of proof in such case is on the defendant to show that the contract provided for a penalty and not for liquidated damages, where there is nothing upon the face of the contract that requires the court to make the legal finding that the provision is for a penalty. Such a contract is prima facie evidence that the parties have stipulated and agreed on the actual amount of damages that ought to be recovered for a breach, and in the absence of evidence to the contrary the damages will be held to be liquidated damages. Delby v. Matson, 137 Iowa, 97; Harper v. Richols, 183 Ill. 370."

In view of the foregoing decision, there is no merit in the present contention, and the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

408 - 32349

JOHN GERVASI, a minor, by
Vito Gervasi, his father
and next friend,
Appellee,

v.

THOS. GUSACK COMPANY, a
corporation,
Appellant.

48 - 4.667
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Gervasi, a minor, by Vito Gervasi, his father and next friend, plaintiff, sued Thos. Gusack Company, a corporation, defendant, in the Superior Court of Cook County in case. There was a trial before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$2500. Judgment was entered on the verdict and this appeal followed. F. V. Beaver was also made a defendant, but the plaintiff when the case was called for trial dismissed the suit as to him.

On July 30, 1931, John Gervasi, about six years of age, while crossing Loomis street at the intersection of Edgewater avenue, Chicago, was struck by an automobile owned and driven by Beaver. The theory of fact of the defendant was that Beaver was a salesman employed by the Thos. Gusack Company to sell outdoor advertising on a commission basis; that he had no expense account for traveling purposes or otherwise; that, under his contract with that Company, he was at liberty to travel any way and anywhere that he saw fit; that he was not required to have an automobile and that he was the sole owner of the one in question, and that the Gusack Company did not, and had not the right to exercise any supervision or

1991-1992 1992-1993 1993-1994 1994-1995 1995-1996 1996-1997 1997-1998 1998-1999 1999-2000 2000-2001 2001-2002 2002-2003 2003-2004 2004-2005 2005-2006 2006-2007 2007-2008 2008-2009 2009-2010 2010-2011 2011-2012 2012-2013 2013-2014 2014-2015 2015-2016 2016-2017 2017-2018 2018-2019 2019-2020 2020-2021 2021-2022 2022-2023 2023-2024 2024-2025 2025-2026 2026-2027 2027-2028 2028-2029 2029-2030 2030-2031 2031-2032 2032-2033 2033-2034 2034-2035 2035-2036 2036-2037 2037-2038 2038-2039 2039-2040 2040-2041 2041-2042 2042-2043 2043-2044 2044-2045 2045-2046 2046-2047 2047-2048 2048-2049 2049-2050 2050-2051 2051-2052 2052-2053 2053-2054 2054-2055 2055-2056 2056-2057 2057-2058 2058-2059 2059-2060 2060-2061 2061-2062 2062-2063 2063-2064 2064-2065 2065-2066 2066-2067 2067-2068 2068-2069 2069-2070 2070-2071 2071-2072 2072-2073 2073-2074 2074-2075 2075-2076 2076-2077 2077-2078 2078-2079 2079-2080 2080-2081 2081-2082 2082-2083 2083-2084 2084-2085 2085-2086 2086-2087 2087-2088 2088-2089 2089-2090 2090-2091 2091-2092 2092-2093 2093-2094 2094-2095 2095-2096 2096-2097 2097-2098 2098-2099 2099-2100 2100-2101 2101-2102 2102-2103 2103-2104 2104-2105 2105-2106 2106-2107 2107-2108 2108-2109 2109-2110 2110-2111 2111-2112 2112-2113 2113-2114 2114-2115 2115-2116 2116-2117 2117-2118 2118-2119 2119-2120 2120-2121 2121-2122 2122-2123 2123-2124 2124-2125 2125-2126 2126-2127 2127-2128 2128-2129 2129-2130 2130-2131 2131-2132 2132-2133 2133-2134 2134-2135 2135-2136 2136-2137 2137-2138 2138-2139 2139-2140 2140-2141 2141-2142 2142-2143 2143-2144 2144-2145 2145-2146 2146-2147 2147-2148 2148-2149 2149-2150 2150-2151 2151-2152 2152-2153 2153-2154 2154-2155 2155-2156 2156-2157 2157-2158 2158-2159 2159-2160 2160-2161 2161-2162 2162-2163 2163-2164 2164-2165 2165-2166 2166-2167 2167-2168 2168-2169 2169-2170 2170-2171 2171-2172 2172-2173 2173-2174 2174-2175 2175-2176 2176-2177 2177-2178 2178-2179 2179-2180 2180-2181 2181-2182 2182-2183 2183-2184 2184-2185 2185-2186 2186-2187 2187-2188 2188-2189 2189-2190 2190-2191 2191-2192 2192-2193 2193-2194 2194-2195 2195-2196 2196-2197 2197-2198 2198-2199 2199-2200 2200-2201 2201-2202 2202-2203 2203-2204 2204-2205 2205-2206 2206-2207 2207-2208 2208-2209 2209-2210 2210-2211 2211-2212 2212-2213 2213-2214 2214-2215 2215-2216 2216-2217 2217-2218 2218-2219 2219-2220 2220-2221 2221-2222 2222-2223 2223-2224 2224-2225 2225-2226 2226-2227 2227-2228 2228-2229 2229-2230 2230-2231 2231-2232 2232-2233 2233-2234 2234-2235 2235-2236 2236-2237 2237-2238 2238-2239 2239-2240 2240-2241 2241-2242 2242-2243 2243-2244 2244-2245 2245-2246 2246-2247 2247-2248 2248-2249 2249-2250 2250-2251 2251-2252 2252-2253 2253-2254 2254-2255 2255-2256 2256-2257 2257-2258 2258-2259 2259-2260 2260-2261 2261-2262 2262-2263 2263-2264 2264-2265 2265-2266 2266-2267 2267-2268 2268-2269 2269-2270 2270-2271 2271-2272 2272-2273 2273-2274 2274-2275 2275-2276 2276-2277 2277-2278 2278-2279 2279-2280 2280-2281 2281-2282 2282-2283 2283-2284 2284-2285 2285-2286 2286-2287 2287-2288 2288-2289 2289-2290 2290-2291 2291-2292 2292-2293 2293-2294 2294-2295 2295-2296 2296-2297 2297-2298 2298-2299 2299-2300 2300-2301 2301-2302 2302-2303 2303-2304 2304-2305 2305-2306 2306-2307 2307-2308 2308-2309 2309-2310 2310-2311 2311-2312 2312-2313 2313-2314 2314-2315 2315-2316 2316-2317 2317-2318 2318-2319 2319-2320 2320-2321 2321-2322 2322-2323 2323-2324 2324-2325 2325-2326 2326-2327 2327-2328 2328-2329 2329-2330 2330-2331 2331-2332 2332-2333 2333-2334 2334-2335 2335-2336 2336-2337 2337-2338 2338-2339 2339-2340 2340-2341 2341-2342 2342-2343 2343-2344 2344-2345 2345-2346 2346-2347 2347-2348 2348-2349 2349-2350 2350-2351 2351-2352 2352-2353 2353-2354 2354-2355 2355-2356 2356-2357 2357-2358 2358-2359 2359-2360 2360-2361 2361-2362 2362-2363 2363-2364 2364-2365 2365-2366 2366-2367 2367-2368 2368-2369 2369-2370 2370-2371 2371-2372 2372-2373 2373-2374 2374-2375 2375-2376 2376-2377 2377-2378 2378-2379 2379-2380 2380-2381 2381-2382 2382-2383 2383-2384 2384-2385 2385-2386 2386-2387 2387-2388 2388-2389 2389-2390 2390-2391 2391-2392 2392-2393 2393-2394 2394-2395 2395-2396 2396-2397 2397-2398 2398-2399 2399-2400 2400

At the sum of \$5000. Judgment was entered on the verdict and this finding the defendant guilty and sentencing the plaintiff's damages against him.

While crossing local streets at the intersection of Belmont Avenue, Chicago, was struck by an automobile owned and driven by Harvey. The theory of fact of the defendant was that Harvey was a salesman employed by the Times. Counsel Company to sell outdoor advertisements on a commission basis; that he had no expense account for traveling purposes or otherwise; that, under his contract with that Company, he was at liberty to travel any way and anywhere that he saw fit; that he was not required to have an automobile and that he was the sole owner of the car in question, and that the Counsel Company did not, and had not the right to exercise any supervision or

control over Beaver in the use of the automobile, and that it paid none of the expenses connected with the same, and the defendant contended that Beaver in operating and using the car in question was not its servant. Plaintiff contended that the defendant had the right to control Beaver in the use of the automobile, and there are certain circumstances in the case that tend to support this contention.

The counts of the declaration, in substance, allege (inter alia) that the defendants, F. E. Beaver and Thos. Gusack Company owned, controlled, ran, managed and operated a certain motor vehicle commonly called an automobile, and that the said defendants negligently and carelessly drove, ran, managed and operated the said automobile at the time and place in question and that as a direct result of the negligent and careless conduct of the defendants the automobile struck and injured the plaintiff. Thos. Gusack company filed a plea of the general issue and a special plea alleging that it did not own, control, run, manage, operate or have any interest in the automobile in question, and that it had no interest in the control, management or ownership of the same.

The defendant contends that as Beaver was the sole owner of the automobile in question, it was necessary for the plaintiff to allege in the declaration that Beaver was the servant of the defendant Thos. Gusack Company in the operation of the automobile at the time and place in question. There is no merit in this contention. When the plaintiff dismissed the suit as to the defendant Beaver, the declaration thereafter stood as if all allegations relating to Beaver had been stricken out. In other words, so far as concerns Thos. Gusack Company, such allegations

control over power in the use of the automobile, and that it paid none of the expenses connected with the same, and the defendant contends that power in operation and using the car in question was not its servant. Plaintiff contends that the defendant had the right to control power in the use of the automobile, and there was certain circumstances in the case that tend to support this contention.

The course of the declaration, in substance, alleges (inter alia) that the defendant, J. H. Sawyer and Thos. Green Company owned, controlled, ran, managed and operated a certain motor vehicle commonly called an automobile, and that the said defendant negligently and carelessly drove, ran, managed and operated the said automobile at the time and place in question and that as a direct result of the negligent and careless conduct of the defendant the automobile struck and injured the plaintiff. Thos. Green Company filed a plea of the general issue and a special plea alleging that it did not own, control, manage, operate or have any interest in the automobile in question, and that it had no interest in the control, management or ownership of the same.

The defendant contends that no power was the sole owner of the automobile in question, it was necessary for the plaintiff to allege in the declaration that Sawyer was the servant of the defendant Thos. Green Company in the operation of the automobile at the time and place in question. There is no writ in this contention. When the plaintiff demanded the writ as to the defendant Sawyer, the declaration transferred force as if all allegations relating to Sawyer had been stricken out. In other words, we let us suppose Thos. Green Company, with allegations

were surplusage. (Postal Telegraph C. Co. v. Likes, 124 Ill. App. 459, 466. Affirmed in the Supreme Court, 225 Ill. 249.) See also Lingquist v. Hodges, 243 Ill. 491. "To state a cause of action against the defendant for a wrong committed by his servant, the ultimate fact necessary to be alleged is, that the wrongful act was committed by the defendant. This may be alleged either by alleging that the defendant by his servant committed the act, or without noticing the servant, by alleging that the defendant committed the act. 2 Chitty Plead., 708, Note n." (Klugman v. Sanitary Laundry Co., 141 Ill. App. 422.) Many years ago it was held that a declaration which charges the defendant with having negligently driven his cart against plaintiff's horse, is supported by evidence that defendant's servant drove the cart. (Brucker against Fromont, Burnford & East's Rep., Vol. 5, 310.) Other cases to the same effect may be found in Chitty.

The defendant contends and argues with considerable force that the plaintiff did not make out a prima facie case that would entitle him to recover on the theory of respondent superior. We have given time and care to the consideration of this important question and we have reached the conclusion that we would not be justified, under all the facts and circumstances in this case, in sustaining that contention.

The defendant contends that the trial court committed fatal error in giving to the jury at the instance of the plaintiff instructions numbered four and five. This contention is meritorious. Instruction number 5 reads as follows:

"If you find from the preponderance of the evidence in this case, that at the time of the accident in question and for a long time prior thereto, the witness Beaver was in the employ of the defendant Thomas Cusack Company as a salesman or solicitor of advertising, and that in the course of and in connection with his duties

very early in the morning. (Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

and business as a salesman for the defendant Thomas Cusack Company, he used an automobile with the knowledge, consent and acquiescence of the defendant Thomas Cusack Company, then under such circumstances in the driving, management, control and operation of said automobile during the hours he was working for said defendant, as such salesman, and in connection with the business of said defendant, he was the servant of said defendant in the management, control, driving and operation of said automobile, and the defendant Thomas Cusack Company would be responsible in law for all injuries and damages resulting from the negligent, careless and improper driving, managing, operating and control of said automobile."

In the present case the vital question was: Did Thos. Cusack Company have the right to control Beaver in the manner of doing his work (see Bristol & Gale Co. v. Industrial Com., 292 Ill. 16, 22); and in that part of his brief wherein he argues that the plaintiff made out a prima facie case in that regard, the plaintiff says: "The rule that the right to control a servant is the vital test determining the relation between master and servant, is well established in the state of Illinois by a long line of cases." In view of certain undisputed facts in the present case, mere knowledge, consent and acquiescence of the defendant Thos. Cusack Company in the use of the automobile by Beaver was not sufficient and the instruction ignores entirely the question of right of control. Instruction number six is subject to the same criticism as instruction number 5.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

and business as a whole, the defendant, Thomas
Cheney, was not an automobile with the
knowledge, consent and acquiescence of the
Thomas Cheney Company. These matters such as control
in the driving, management, control and operation
of the automobile during the hours he was working
for said defendant, as such employee and in connection
with the business of said defendant, he was the servant
of said defendant in the management, control, driving
and operation of said automobile, and the defendant
Thomas Cheney Company cannot be held responsible in law
for all injuries and damages resulting from the
negligent, careless and improper driving, management,
operation or control of said automobile.

In the present case the vital question was: Was Thomas
Cheney an agent of the Thomas Cheney Company in the control of the
automobile? (see Winters v. Industrial Co.)
In the case of Winters v. Industrial Co., 100 Cal. 231, and in that part of his brief wherein he argues that
the plaintiff is not entitled to recover, the
defendant says: "The rule that the right to control a servant
is the vital fact determining the relation between master and
servant, is well established in the state of Illinois by a long
line of cases." In view of certain undisputed facts in the
present case, more knowledge, consent and acquiescence of the
defendant, Thomas Cheney Company in the use of the automobile by
Cheney was not sufficient and the instruction ignored entirely
the question of right of control. Instruction number six is
subject to the same criticism.
The judgment of the Superior Court of Cook County
is reversed and the cause is remanded for a new trial.

REVEREND AND HONORABLE
JAMES H. HARRIS, J., and GRADY, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 23 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

| | | |
|------------------------------|---|-----------------|
| Clara Handel, Appellee, | : | |
| | : | Appeal from the |
| v. | : | Circuit Court |
| | : | of Carroll |
| Christ Handel, Administrator | : | County. |
| of the estate of Dorothea | : | |
| Handel, deceased, Appellant, | : | |

JONES J:

Appellee, Clara Handel, filed a claim against the estate of her mother, Dorothea Handel, in the county court of Carroll County, for attention and nursing during the last illness of said decedent. She produced no evidence before the county court and the claim was disallowed. An appeal was thereupon taken to the circuit court and the cause tried before a jury which returned a verdict in favor of appellee for \$2970.32. A new trial was granted and upon another hearing the jury returned a verdict for \$2500 upon which verdict the judgment herein was rendered.

An appeal was taken to the Supreme Court of this State and the cause has been certified to this court by the Supreme Court. Claimant contends that a contract existed between her and her mother with respect to compensation. Proof of the existence of such a contract was made by Herman Handel, and Rosina K. Walters, brother and sister of claimant. They testified in substance that they heard their mother say on several occasions, beginning in the year 1918, that she would pay claimant the same as she would pay any stranger, and would also furnish her clothes and other necessities.

Appellant admits that there was a contract between claimant and the decedent but he contends that under its terms, the claimant was to receive \$100 per year and her clothes; and that payment according to such contract was made by the decedent in her lifetime. This contention is supported by the testimony of Mrs. John Burke, also a sister of claimant. Sam Handel, a brother, did not testi-

Appeal from the
Circuit Court
of Carroll
County.

State of Tennessee,
County of Carroll,
vs.
John H. Hanks,
Appellant.

1888.

Appeal from the Circuit Court of Carroll County, Tennessee, in the case of John H. Hanks, Appellant, vs. State of Tennessee, Defendant. The case was tried before a jury which returned a verdict in favor of the appellant for \$2370.32. A new trial was granted and upon another hearing the jury returned a verdict for \$2500 upon which verdict the judgment herein was rendered.

An appeal was taken to the Supreme Court of Tennessee. This case was heard and certified to the Supreme Court by the Supreme Court. Claimant contends that a contract existed between her and her mother with respect to the said. Proof of the existence of such a contract was given by her mother, and the court found in favor of the claimant. The court held that the claimant was entitled to the said sum of money, and that she would pay claimant the same as she would pay any other, and that the claimant was entitled to the said sum of money.

Appellant admits that there was a contract between claimant and her mother, but she contends that under the terms of the contract the claimant was to receive \$100 per year and not \$2500; and that payment according to such contract was made to her by her mother. This contention is supported by the testimony of Mrs. John Hanks, also a witness at the trial, who testified that she paid the claimant \$100 per year.

fy to having heard any conversation between claimant and decedent in regard to the amount which was to be paid for services, but he testified that shortly before the death of his mother, he heard her say, in the presence of claimant, that the latter had been fully paid.

The administrator offered in evidence a letter written by claimant to her sister, Mrs. Burke, dated August 21, 1918. This letter dealt mostly with family occurrences and evidently undertook to reply to a request of Mrs. Burke for a loan. It contains the following language:- "As for getting some money. The first week in October, I was going to buy a Liberty Loan. But if you will give me the interest which I can get out of the fourth Liberty Bond, will loan you a hundred dollars for a year. The first week in October Mother gets her rent. Then I get my hundred dollars and if you want to do that let me know." The only objection made to the admission of this letter is that it was not competent or relevant. The court sustained the objection. This was substantial error because the letter not only tends to corroborate appellant's theory of the case as to what compensation claimant was entitled to under the contract with her mother, but it is a written declaration of claimant against her own interest. It is urged that this letter is obscure and does not state that the \$100 mentioned was to be paid as compensation to appellee for services to her mother. It would indeed be putting a strained construction on the letter, if under the facts and circumstances in evidence, we should conclude that it did not have direct reference to compensation. It is also urged that the letter was dated more than five years preceding the death of the decedent and that the contract relied on for recovery was oral and not made until April 1921. This argument offers no excuse for the refusal to admit the letter. It tended to support appellant's theory that a contract of employment upon certain terms had at one time existed and what those terms were.

to having been my own property, and I am not aware of any other person having been interested in it. I am not aware of any other person having been interested in it. I am not aware of any other person having been interested in it.

The defendant's statement is entirely untrue. It is a complete fabrication. It is a complete fabrication. It is a complete fabrication. It is a complete fabrication. It is a complete fabrication.

It contains the following language: "I am not getting some money. The first week in October, I was going to buy a Liberty Loan. But if you will give me the money, which I can get out of the Fourth Liberty Bond, will loan you a hundred dollars for a year. The first week in October Mother gets her rent. Then I get my hundred dollars and if you want to do that let me know." The only objection made

to the admission of this letter is that it was not competent or relevant. The court sustained the objection. This was a material error because the letter was relevant to the issue of the defendant's intent to commit the crime. The letter was relevant to the issue of the defendant's intent to commit the crime. The letter was relevant to the issue of the defendant's intent to commit the crime.

as a matter of fact, the letter was not relevant to the issue of the defendant's intent to commit the crime. The letter was not relevant to the issue of the defendant's intent to commit the crime. The letter was not relevant to the issue of the defendant's intent to commit the crime. The letter was not relevant to the issue of the defendant's intent to commit the crime. The letter was not relevant to the issue of the defendant's intent to commit the crime.

It tended to support the defendant's theory that a contract of employment upon certain terms had been made and that the defendant was not guilty of the crime. It tended to support the defendant's theory that a contract of employment upon certain terms had been made and that the defendant was not guilty of the crime. It tended to support the defendant's theory that a contract of employment upon certain terms had been made and that the defendant was not guilty of the crime.

In the absence of proof to the contrary it would be presumed that the parties continued their relation under the terms of that contract. Moreover appellee's claim is based in part upon the testimony of Rosina K. Walters, who testified to having heard a conversation in June 1918, in which her mother said she would pay appellee the same as she would pay a stranger. The latter was important to the issue and it was error to refuse its admission in evidence.

The claimant was offered as a witness in her own behalf. Her competency was objected to and her counsel replied, "She is not incompetent to testify what happened after her mother's death. If you don't want the jury to hear, you can say so." Appellant objected to the remark and it was withdrawn by permission of the court. She was then asked if during the year 1921 she had a conversation with her mother which she answered affirmatively. An objection was sustained by the court. Counsel asked the question a second time. After an adverse ruling the witness was withdrawn, her counsel stating, "That is all that I can ask of that woman." Counsel should not have intimated to the jury that he was not able to have claimant testify and that appellant was unwilling or afraid to have her testify.

Upon the cross examination of a witness for appellant who testified that the rate of compensation to be paid appellee was \$100 a year, claimant's counsel said, "At the rate of \$100 a year, that is the rate of \$1.92 a week, isn't it?" An objection was sustained to the question. He later asked the same witness on further cross examination, "\$100 a year means a rate of \$8.00 a month?" which the court ruled the witness could answer. These questions were argumentative and were undoubtedly asked to show that the contract which appellant claims was entered into between appellee and the decedent was unfair and unconscionable. The mere sustaining of objections to improper remarks will not cure the error. (Illinois Central Railroad Company v. Seitz

In the absence of proof to the contrary it would be presumed
that the parties intended their relation should be that of
husband and wife. However, appellant's claim is based on the
fact that the testimony of James E. Wilson, who testified to having
heard a conversation in June 1921, in which one woman
said she would not sign the same as her husband's
signature. The latter was important to the claim and the
was error to refuse its admission in evidence.
The claimant was offered as a witness in her own
behalf. Her competency was objected to and her counsel
replied, "She is not incompetent to testify what she
after her mother's death. If you don't want the
hear, you can say so." Appellant objected to the remark
and it was withdrawn by permission of the court. The
then asked if during the year 1921 she was a
with her mother which she answered affirmatively. The
objection was sustained by the court. Counsel then
question a second time. After an answer which was
was withdrawn, her counsel stating, "That is all that I
ask of that woman." Counsel should not have insisted on
the fact that he was not a party to the claimant's testimony and
that appellant was entitled to stand by her testimony.
Upon the cross-examination of a witness for
appellant who testified that she was of legal age at the
he said appellant was 1902 a year, appellant's counsel asked,
"At the age of 1902 a year, how is it possible to be
a week, isn't it?" An objection was sustained to the ques-
tion. He later asked the same witness on further cross
examination, "1902 a year means a year of 365 days a month?"
When the court ruled the witness could answer. These ques-
tions were answered by the witness and the court ruled in favor of
the answer which appellant desired. The court then asked the
appellant and the witness if they were married. The
were maintaining an objection to the answer. The court
was the error. (Illinois Central Railroad Co. v. Wilson)

111 Ill. App. 242; (affirmed in 214 Ill. 350; Pioneer Reserve Association v. Jones 111 id. 156; Eshelman v. Rawalt, 298 Ill. 192.)

Hannah Knauer, a sister of appellee, was not called as a witness in chief by either party to the suit. She was produced in rebuttal by counsel for appellee, who immediately asked her if she had not been a witness on one of the former trials, and had testified against claimant. The questions were objected to on the ground that they were not proper in rebuttal. She was asked about her former testimony and upon objection being made, appellee's counsel replied "It shows where she stands and I want to ask a direct question too because she is an interested person." The court overruled the objection and then counsel proceeded to ask the witness if she had not had a conversation with her mother at Rockford about some pay that was due appellee. This question was objected to as leading and suggestive but the court overruled the objection and required the witness to answer. Counsel then asked the witness "In that conversation did your mother say to you that she wanted Clara paid for the last six years?" The witness replied "Two years"; whereupon counsel produced a letter written by the witness to her sister, Mrs. Walters and subjected the witness to a rigid cross examination as to whether or not she had stated in the letter that the period of time for which her mother expressed a wish for Clara to be paid was six years instead of two years. Appellant's objections to these questions were overruled by the court. Upon the letter being offered in evidence appellant's counsel objected and his objection was overruled. Appellee's counsel read a part of the letter to the jury. For some reason not accounted for in the record he stopped before he reached the portion of it above quoted and thereupon rested his case.

... a sister of ...
... called as a witness in ... by either party to the suit.
... The was produced in ... of ...
... was immediately ... by ...
... one of the ...
... The questions were objected to on the ground that they were
... not proper in rebuttal. She was asked about her former
... testimony and upon objection being sustained, she was asked
... replied "It shows where she stands and I want to ask a
... direct question too because she is an interested person."
... The court overruled the objection and then I proceeded
... to ask the witness if she had not had a conversation with
... her mother at ... about ...
... This question was objected to as leading and suggestive
... but the court overruled the objection and replied to
... witness to answer. Counsel then asked the witness "In
... that conversation did your mother say to you that she
... wanted Clara paid for the last six years?" The witness
... replied "Two years"; whereupon counsel produced a letter
... written by the witness to her sister, Mrs. Walters and
... subjected the witness to a rigid cross examination as to whether
... or not she had stated in the letter that the period of time
... for which her mother expressed a wish for Clara to be paid
... was six years instead of two years. Plaintiff's objection
... to these questions was overruled by the court. The
... letter being offered in evidence, Plaintiff's counsel objected
... and his objection was overruled. Plaintiff's counsel then
... of the letter to the jury. The jury returned and rendered the
... in the record as stated before at ...
... above stated and ...

Upon no basis was the examination of the witness justified or the offer of the letter allowable. The obvious purpose was to communicate to the jury the contents of the letter, manifestly incompetent under the situation as it then existed.

This case is close on the facts and under the circumstances it is necessary that the trial be free from substantial error. (Carlin v. Chicago Ry. Co. 205 Ill. App. 303.) The errors we have pointed out are serious and were calculated to prejudice the rights and interests of appellant. The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

Upon no basis was the examination of the witness

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of the letter, manifestly incompetent under the situation

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This case is close on the facts and under the

circumstances it is necessary that the trial be free from

substantial error. (Garlin v. Chicago Ry. Co. 308 Ill. App.

303.) The errors we have pointed out are serious and were

calculated to prejudice the rights and interests of appellant.

The judgment of the circuit court is reversed and the cause

remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2481.A. 6074

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 2 - 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-------------------------------------|---|----------------------|
| Alexander H. Steenrod, Receiver | : | |
| for L.M. Gross Company, a Corpora- | : | |
| tion, | : | |
| | : | |
| Appellant, | : | Appeal from |
| | : | the Circuit Court of |
| v. | : | Stephenson County. |
| | : | |
| L.M. Gross Company, a Corporation, | : | |
| for the use of Second National Bank | : | |
| of Freeport, | : | |
| | : | |
| Appellee, | : | |

JonesJ:

This is an appeal from an order of the Circuit Court of Stephenson County adjudging appellant to be in contempt of court and committing him to jail until he pay the Second National Bank of Freeport, Illinois, \$2500 and interest due on two receiver's certificates. The amount due when this order was made on September 7, 1926 was \$2745.25.

Appellant was appointed receiver in this cause under a verified bill filed by H.R. Dry, a stockholder and director of L.M. Gross Company, which had been doing business in Chicago, but had later moved to Freeport through certain inducements of the Kiwanis Club of the latter city. The corporation, its creditors and the other stockholders were made defendants. The bill alleges there was a chattel mortgage to one Stein for \$900 on certain property of the company; that to obtain credit for the company, L.M. Gross, its president, had turned over to it a certain automobile, which was subject to a mortgage of \$900 to William H. Lewis Motor Company; that a mortgage for \$4,000 was made to Arthur A. Haas of Freeport, as trustee for the Kiwanis Club, on all the chattels and equipment of the Company to secure moneys advanced by members of the club; that the mortgage is a first lien and that complainant believed the other mortgages are second mortgages; that the corporation was engaged in the manufacture of women's dresses, other wearing apparel, and in general, operating a garment factory; that it had many orders for goods to be delivered, a great deal of raw material and partly finished products on hand as well as certain raw material belonging to a customer,

under contract to make the same into finished goods. It is further alleged that the company was overdrawn at the Knowlton State Bank; that its assets, without allowing depreciation, wear, or tear, approximately equaled its liabilities; that a large portion of the assets consisted of raw material not available for payment of debts unless made into completed products and that its machinery was of little or no value, except in actual use as a whole for the purpose for which it was intended; that if the business was properly managed and supplied with capital, it would be profitable and that the raw materials could be profitably manufactured and shipped upon the orders on hand, producing two or three times as much for the payment of debts as if sold in its present form; that the factory had suspended business and that Haas had taken possession of it and all the property of the corporation under his mortgage; that creditors were threatening suit and that if the suits proceeded to judgment and execution, they would result in inequalities among the creditors, a waste of the assets and dissipation of the property; but if properly managed and kept together, would probably pay all claims in full. On the same day the corporation and two of the mortgagees, Stein and Haas, entered their appearance in writing and consented to the appointment of a receiver.

Appellant qualified as receiver and filed a report of the financial condition of the company as disclosed by a balance sheet made from its books, showing assets of \$12,960, and liabilities to the same amount. The report stated that it did not show the exact status of the business, but represented that taking into consideration the raw material and orders on hand for finished products, it would be profitable to operate the business, and that the only profitable way to dispose of the materials was to make them into finished products. The report stated that it would be necessary to purchase additional raw materials, employ labor and meet operating expenses. It prayed for an order authorizing

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the receiver to conduct the business and issue receiver's certificates for borrowed money to the extent of \$2500 for such purposes. On the hearing the court entered an order authorizing the receiver to conduct the business and to issue receiver's certificate not to exceed \$2500, the same to be a paramount lien on all the assets of the corporation.

Four months later, appellant filed a report showing assets of the company of the value of \$7190.54 and liabilities of \$13,628.48, which latter amount included the receiver's certificates of \$2500 issued to the Second National Bank of Freeport. On the same day, the court, after hearing testimony in open court, entered an order finding the corporation insolvent, and dissolving it. The order also found that there were outstanding receiver's certificates to the amount of \$2500 plus interest, and that the same were a first lien on all property of the corporation. It made findings with reference to the mortgages above mentioned and directed that the assets of the corporation be sold by the receiver disencumbered of all liens, at public sale for cash, specifying the notice to be given. In pursuance of this order, the receiver afterwards reported to the court that he had sold the assets for \$4500 and that the purchasers had paid the purchase price to him.

About a year thereafter the court, upon a petition of the Second National Bank of Freeport, Illinois, entered a further order directing the receiver to file a complete report from the date of such sale, and that he pay petitioner the amount of the two receivers' certificates, with accrued interest, within twenty days from the date of the order. Thereafter the Bank filed a petition alleging that appellant had wilfully neglected and refused to comply with the order, and praying for a rule on him to show cause why he should not be attached and punished as for contempt. On

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authorizing the receiver to conduct the business and to
leave receiver's certificate not to exceed \$2500, the same
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Four months later, appellant filed a report show-

ing assets of the company of the value of \$190.8 and li-
abilities of \$12,328.48, which latter amount included the
receiver's certificates of \$2500 issued to the Second National
Bank of Freeport. On the same day, the court, after hear-
ing testimony in open court, entered an order finding the
corporation insolvent, and dissolving it. The order also
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to the amount of \$2500 plus interest, and that the same were
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findings with reference to the assets of the corporation as sold
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interest, within twenty days from the date of the order.
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pellant had willfully neglected and refused to comply with
the order, and praying for a rule on him to show cause why
he should not be attached and punished as for contempt. On

the same day he answered the petition stating that at the time of the sale it was proposed by a group of citizens of Freeport to organize a corporation to purchase the property; that a representative of the group bid the sum of \$4500 and the property was struck off and sold to him; that the subscriptions to the capital stock of the proposed corporation had never been paid, except in part, and the purchase price has never been paid. The answer alleges good faith on the part of appellant in his efforts to collect the purchase price. It further alleges that one of his bondsmen was out of town and asks that the matter be continued until his return or until appellant can have a reasonable time to borrow or otherwise secure the amount. The court held the answer insufficient, denied the prayer for continuance, and ordered appellant to pay the amount of the certificates and interest within twenty days.

After the expiration of the time specified in the last order, the bank filed another petition stating appellant had not complied with the former order and praying that he be cited for contempt of court. A citation was ordered to issue, and upon the hearing appellant was adjudged guilty of contempt and ordered committed to jail, until he should comply with the order. The next day he filed his petition supported by affidavit, asking to be purged of contempt for failure to comply with the order of the court. The affidavit set up substantially the same reasons as were embraced in his former application for continuance and that there was nothing further to report since the confirmation of the sale by the court. The petition was denied and this appeal followed.

A motion was made in this court by appellee to dismiss the appeal on the ground that the order appealed from was not an appealable order. This motion was taken with the case. We are of the opinion that a contemnor has a right

the same day he answered the petition and stated that the time of the sale is now postponed to a date to be fixed by the court. He also stated that he was not in a position to pay the debt and that the property was being sold to satisfy the debt. The court then ordered that the sale be postponed to a date to be fixed by the court. The answer alleges good faith on the part of the defendant in his attempt to sell the property. It further alleges that one of his bonds was not out of bond and that the debt was not a reasonable time to borrow or otherwise secure the amount. The court held the answer insufficient, saying the answer did not contain any material facts and ordered judgment to be entered against the defendant and against the estate of the defendant.

After the expiration of the time specified in the last order, the bank filed another petition stating appellant had not complied with the former order and praying that he be cited for contempt of court. A citation was ordered to be served on appellant and upon the parties appellant was required to appear and answer and explain the reasons for his failure to comply with the order. The court then ordered that the petition be supported by affidavit, saying it was not a contempt for failure to comply with the order of the court. The affidavit set up substantially the same grounds as were set up in the first petition. The court then ordered that the petition be supported by affidavit, saying it was not a contempt for failure to comply with the order of the court. The petition was then set for trial and the court ordered that the petition be supported by affidavit, saying it was not a contempt for failure to comply with the order of the court.

A motion was made for judgment on the petition and the court granted the motion. The court then ordered that the petition be supported by affidavit, saying it was not a contempt for failure to comply with the order of the court. The petition was then set for trial and the court ordered that the petition be supported by affidavit, saying it was not a contempt for failure to comply with the order of the court.

to appeal where the order requires him to pay a certain sum of money to another and to be imprisoned in default of such payment. Appeals by receivers have been allowed on the question of compensation; (*McAnrow v. Martin* 183 Ill. 467.) also where a decree required him to pay out his own funds to replace trust funds distributed by him; (*Reardon v. Youngquist* 189 Ill. App. 3.), and where the question of a distribution was involved, (*Kavanagh v. Bank of America* 239 Ill. 405.) In view of these authorities, the motion to dismiss the appeal is denied.

Appellant contends that the allegations of the original bill were predicated upon a continuance of the business and its success, and not upon a forfeiture of its franchise or the preservation of corporate property, and therefore, the court was without initial jurisdiction. Upon this hypothesis, he contends that all subsequent orders were void. The allegations of the bill are sufficient to show the doubtful solvency of the corporation and the probable loss of all its assets, but that if properly managed and kept together, all creditors would probably be paid in full. Formerly the powers of courts of equity to authorize an issue of receiver's certificates and to make them a prior lien was confined to railroads and semi-public corporations, but later authorities gave them the same powers in respect to industrial corporations. These powers are confined to the purpose of preserving the corporate property and franchise. The object of appointing a receiver is to preserve the property for the benefit of all parties interested, and while the authority of a court to continue a business in the hands of a receiver and to charge the expenses thereof on the corpus of the property is more of an exception to a general rule than a rule itself, the court in its discretion has such right upon a proper showing being made. (*Fleming v. Anderson* 220 Ill. App. 570; *Makeel v. Hotchkiss* 190 Ill. 311; *Knickerbocker v. McKindley Coal and*

view of these authorities, the motion to dismiss

as involved, (*Kavanaugh v. Bank of America*, 829 F.2d 1011, 76-1 U.S. App. 8.), and where no question of a taking

Mining Company 172 id. 535; Pittsburgh Plate Glass Co. v. Kransz 291 id. 84; Equitable Trust Co. v. Chicago, etc. 223 Ill. App. 445.) We think a proper showing was made to authorize the order to continue the business and for the issuance of receiver's certificates.

But it is urged that the court was without jurisdiction to order the issuance of receiver's certificates without notice to and consent of creditors. The mortgage on the automobile was foreclosed by the mortgagee holding it. Stein and Haas, the holders of the other two mortgages, each consented to the appointment of a receiver. Neither of them is here complaining. The attorney who represented Haas, as trustee for members of the Kiwanis Club, filed appellant's petition for the issuance of the receiver's certificates. Appellant was one of the contributors to the fund of \$4,000 subscribed for the benefit of the company and he has foreclosed himself of any right of complaint as a subscriber to the fund. No other contributor objected to the proceedings. We are of the opinion that it was not necessary that general creditors should have had notice or consent to the entry of the decree authorizing the issuance of the receiver's certificates.

Appellant contends that the chancellor had no jurisdiction to authorize the operation of the corporate business and the issuance of receiver's certificates as a paramount lien on the assets. The authorities above cited dispose of this contention adversely to his claim. He represented to the court that it would be to the best interests of all concerned to operate the business and prayed for authority to issue receiver's certificates; and he ought not be heard to question the order. He contends that he did not, in his petition, ask that the certificates be made a paramount lien. The order was made, responsive to his prayer. As an officer of the court and as such petitioner, he is presumed to know

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its contents. He acted thereunder without protest or suggestion that the same be modified. By acting under the order he acquiesced in its provisions.

He claims that one of the certificates states that it is a prior lien on unencumbered assets and that it is therefore not a lien paramount to the mortgages. It recites that it is issued pursuant to the order of the court, and he cannot avail himself of his own mistake or failure to comply with the order. It is finally contended that the court erred in denying his petition to be purged of contempt on the ground, among others, that he had not received the purchase money of \$4500 as reported by him, and that he made the sale and report thereof in good faith, believing the money available to him as soon as the new corporation was formed. His report of sale was filed on May 8, 1925. He took no step for more than a year thereafter to inform the court that he had received no money on the purchase price, and he has never invoked the aid of any court in the premises. He claims that a suit against the purchaser would be unavailing because the proceeding was void. As the officer making the sale, it is not for him to say that his act was void, nor is it within his province to dispute the legality of his appointment. A sheriff making a sale under execution could as well deny its validity on the ground that he was not legally elected. It is further claimed that the orders of the court are conflicting, and that it finds the certificates and the mortgages each to be first liens. If there is any ambiguity or conflict in the findings the situation is of appellant's own making, and he should not be heard to complain of his own acts. The money was advanced by appellee bank upon receiver's certificates issued by appellant under the order of the court made at his solicitation. The court had jurisdiction of the subject

the contents. The order was issued by the court on the 11th of June, 1925, and the same was delivered to the sheriff on the 12th of June, 1925. The order was as follows: "The court do hereby order that the sum of \$4500 be paid to the plaintiff out of the proceeds of the sale of the property described in the complaint." The order was signed by the court and the clerk of the court. The order was delivered to the sheriff on the 12th of June, 1925. The sheriff then proceeded to execute the order. He first went to the place where the property was located and found that the property was in the hands of the defendant. He then proceeded to sell the property. The sale was made on the 15th of June, 1925. The proceeds of the sale were \$4500. The sheriff then paid the money to the plaintiff. The plaintiff then filed a motion for judgment on the order. The court granted the motion. The court then entered judgment in favor of the plaintiff. The court then ordered that the costs of the suit be paid by the defendant. The defendant then appealed the judgment. The appeal was heard on the 18th of June, 1925. The court affirmed the judgment. The court then ordered that the costs of the appeal be paid by the defendant. The defendant then paid the costs of the appeal. The case was then closed.

matter of the proceeding, and appellant as an officer of the court should have complied with its orders.

The order of the circuit court adjudging him guilty of contempt is affirmed.

Order affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

657a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice. 24

JUSTUS L. JOHNSON, Clerk. 7

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 23 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

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|---------------------|------------|---|
| Wallace Shallcross, | Appellee, | : |
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| | v. | : |
| | | : |
| | | : |
| | | : |
| Paul Bianchi, | Appellant, | : |

Appeal from the
Circuit Court of
Winnebago County.

JONES J:

Wallace Shallcross, appellee, recovered a judgment for \$1200 against Paul Bianchi, appellant on account of injuries received in a collision between an automobile driven by appellant and a motorcycle ridden by appellee. The accident occurred at the intersection of South Winnebago and Loomis Streets in the city of Rockford.

The first count of the declaration is a general negligence count. The second count charges that appellant operated his automobile at a high rate of speed, contrary to the statute. A plea of the general issue was filed with notice of special matter of defense. The special matter relied upon was that appellee failed to stop his motorcycle as required by an ordinance of the city of Rockford, making South Winnebago Street, on both sides of the intersection where the accident occurred a preferential traffic street.

Appellee was driving his motorcycle east on Loomis Street. He testified that he stopped about 20 feet west of Winnebago Street; that he saw appellant coming South on said Street between 200 and 250 feet away from him; that he pulled in on Winnebago Street on the south side thereof and travelled around the center of a manhole, intending to stop at a store on the northeast corner of the intersection; that when he was northeast of the manhole he saw defendant bearing down upon him headed at a southeast angle; and that appellant's automobile ran into the front fender of his motorcycle striking him in the left leg and knocking him over. Appellant testified that instead of his automobile striking appellee's motorcycle, the motorcycle ran into his automobile striking

Appeal from the
Circuit Court of
Winnebago County.

Paul Bianchi, Appellant,

JONES 1:

Wallace Shalvors, appellee, recovered a judgment for \$1200 against Paul Bianchi, appellant on account of injuries received in a collision between an automobile driven by appellee and a motorcycle ridden by appellee. The accident occurred at the intersection of South Winnebago

and Loomis Streets in the city of Rockford.

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Winnebago Street; that he saw appellant coming South on said

Street between 200 and 250 feet away from him; that he

in on Winnebago Street on the south side of the intersection

around the center of a manhole, intending to stop at a store

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was northeast of the manhole he saw defendant bearing down

upon him headed at a southeast angle; and that appellee's

automobile ran into the front fender of his motorcycle striking

him in the left leg and knocking him over. Appellant testi-

that first instant of the collision he was on the north side

motorcycle, the motorcycle was on the south side of the

his running board just back of the front fender. The evidence was conflicting as to how the collision occurred.

The first ground relied upon for reversal is the ruling of the court on the evidence. Appellee was allowed to testify over the objection of appellant that he, appellee, said to appellant after the accident, "Jesus, brother, I know you have broken my leg won't you take me home?" and that defendant said to him, "No you motorcycle son of a bitch lay there." There was no count in the declaration charging wilfulness and wantonness. The alleged statement of appellant did not tend to throw any light on any issue in the case. It did not relate to the accident and did not explain or characterize the manner in which it occurred. The record discloses that the collision and injury had occurred and that appellant had parked his car and had come back to where appellee was lying. It was at this time the alleged statement was made. It was not a part of the res gestae and tended to prejudice the jury against appellant. Its admission in evidence was error. (Chicago West Division Railway Company v. Becker 123 Ill. 545; Chicago City Ry. Co. v. Uhter 212 id. 174 p. 183.)

Appellee was asked on cross examination if he could take a piece of paper and pencil and draw a diagram and show on the diagram where he was when he was struck. An objection to the question was sustained. It is urged this was error. The question of appellee's skill as a draftsman was not in issue and the objection was properly sustained.

The first instruction given on behalf of appellee is but an abstract proposition of law, and under the holding in Swanlund v. Rockford Ry. Co. 305 Ill. 339, and Joroszewski v. Chicago Rys. Co. 241 Ill. App. 1, should not have been given. A further objection to the instruction is that the testimony shows appellee was 21 years old at the time of the accident, although the suit seems to have been

218-15-174 p. 183.)

brought by him as a minor through his next friend. The reference in the instruction to "persons of his age and understanding" tended to lead the jury to believe it applied only to appellee. He being of legal age, no reference to age should have been made.

The second instruction given on behalf of appellee is long, involved and argumentative. The same criticism is equally applicable to appellant's fifth instruction. Both instructions should have been refused. The sixth instruction given on behalf of appellee is also an abstract proposition of law. It is involved and argumentative and should not have been given. The record discloses no situation making it applicable to the facts.

One of the objections to the seventh instruction given on behalf of appellee is that the jury were told that they might take into consideration any future loss of health occasioned by the injury, it being the contention that the declaration contained no averment as to future loss of health or any loss of health, and that there was no evidence of any such future loss. The declaration contains an averment that appellee became sick, sore, lame and disordered and remained so from thence hitherto and will suffer pain in the future of a permanent character. The word "health" as ordinarily used is a relative term. It has reference to the condition of the body. It means freedom from disease, sickness, or pain. (29 C.J. Health 241, citing *Hubbard v. Patterson* 45 N.J.L. 310.) *Bouvier's Law Dictionary* defines "health" as freedom from pain or sickness. The testimony of appellee tends to show he had not fully recovered at the time of the trial. Instructions as to future damages have been frequently up held on similar evidence. (*Swincsynski v. Kelly Coal Company* 151 Ill. App. 158; *Rumpza v. Knickerbocker Ice Co.* 141 id. 433; *Shewbridge v. Chicago City Ry. Co.* 188 id. 454; *Kennedy v. Swift & Company* 234 Ill. 606.) To the same effect

... brought by him on a motion for judgment on the merits. The court
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... trial. Instruction 7 is therefore an abstract proposition
... in of itself on which judgment should not be based. (Winters v. Kelly 302
... 100, 101 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is the holding of this court in Forraker v. Slocum No. 7655 at the October Term 1926 of this court.

Instruction No. 10 given on behalf of appellee told the jury that if the evidence preponderates in his favor but slightly it is sufficient. It is contended that this was error under the ruling in Teter v. Spooner 305 Ill. 311. That case was a will case and instructions which use any adjective modifying the word "preponderance" have been condemned by the Supreme Court in will cases. Instructions like the one in the case at bar have been frequently upheld in other cases by both the Supreme and Appellate Courts of this state, and we know of no negligence case where an instruction using the words "slight preponderance" has been condemned. However, as the Supreme Court in Teter v. Spooner, supra, has criticised the use of qualifying adjectives in connection with the word "preponderance" without limiting the criticism to cases involving testamentary capacity in will cases, we are of the opinion that it is the better practice to omit the use of any such qualifying adjectives, and that upon another trial of this cause an instruction of this character should not be given.

The eleventh instruction given on behalf of appellee reads "The Court instructs the jury that in this case the plaintiff is only required to make out his case by a preponderance of the evidence to entitle him to recover, and any of the evidence in this case, whether circumstantial or positive and direct, which tends to produce belief in the minds of the jury is proper to be considered by you in determining whether or not the defendant is liable." It is abstract in form and its tendency would be to mislead the jury to apply it only to the testimony on behalf of appellee. It is faulty in failing to tell the jury that such evidence is proper to be considered with all the other evidence in the case.

1. The staff of the Department of State and the Department of Defense

1000-1000 to 1000-1000, ordered and to

Attachment to letter to you of 12/1/61 re: 100-441000

The jury found the evidence preponderates in his favor.

and sufficient. It is contended that this

Approved by the Supreme Court in 1911.

1. The first group of people who are not allowed to enter the country are those who are considered to be a threat to national security. This includes anyone who is involved in espionage, sabotage, or other activities that could harm the country's interests.

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Complaint is made by appellant that the twelfth instruction given on behalf of appellee refers the jury to the declaration or the instructions to determine the issues. The instruction, after telling the jury that if from the evidence and under the instructions of the court, they shall find for plaintiff and that plaintiff has sustained injuries to his person "as complained of herein and as shown by the evidence," lays down a rule for the measure of damages. The injuries referred to are those shown by the evidence and the objection is not well taken. Furthermore, it does not purport to lay down any rule for the measure of damages in case the jury finds the issues for appellee. It is entirely different from an instruction which declares that if the jury find from the evidence that the plaintiff has made out his case as alleged in the declaration, then they shall find the defendant guilty. Under the holding in *Bernier v. I.C. R.R. Co.* 296 Ill. 464, it was not error to give this instruction.

Appellant insists that the giving of appellee's 13th instruction was error, in that it told the jury it was plaintiff's duty to have his automobile under such control, as to be able to slow up or stop if necessary to avoid a collision with other persons rightfully and lawfully using the highway, and in the exercise of reasonable care for their own safety. This instruction unduly emphasises the duty of appellee by ignoring the reciprocal duty of appellant.

It is objected that appellee's 14th instruction directs the jury to give the plaintiff such damages as will properly and fully repay for the damages done to his person and motorcycle. It is insisted that the word "properly" left the jury without a legal measure for determining the damages. We think the point is well taken and the instruction should have been more carefully guarded.

While the above mentioned instructions contain the errors pointed out, we would not be inclined to reverse

Appellant insists that the giving of appellee's 13th instruction was error, in that it told the jury it was appellee's duty to have his automobile under such control, as to be able to slow up or stop if necessary to avoid a collision with other persons rightfully and lawfully using the highway, and in the exercise of reasonable care for his own safety. This instruction unduly emphasizes the duty of appellee by ignoring the reciprocal duty of appellant. It is objected that appellee's 14th instruction directs the jury to give appellant the damages as will properly and fully repay for the damages done to his person and automobile. It is insisted that the jury should be told that the duty of appellant is to drive with care and to keep his eyes on the road and to guard against being carelessly guarded.

With the above mentioned instructions contained in the charge, the jury returned a verdict in favor of appellant.

the judgment on account of them. Our criticism is for guidance in another trial. But appellee's 15th instruction contains an error which the Supreme Court has held is sufficient of itself to work a reversal. This instruction sets out the provisions of the Motor Vehicle Law, and then tells the jury that if they believe from the preponderance of the evidence that appellant was driving his automobile at a rate of speed in excess of 15 miles an hour, in the residence portion of an incorporated city, "then you are instructed that such rate is prima facie evidence and that the said Paul Bianchi was operating said motor vehicle at a rate of speed greater than was reasonable and proper." Under the holding in Johnson v. Pendergast 308 Ill. 255 the giving of this instruction constituted reversible error.

The judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

248 L.A. 1181

BE IT REMEMBERED, that afterwards, to-wit: On
MAR 23 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

WALTER E. HELLER AND COMPANY, :
: :
: :
v. : Appeal from the Cir-
: : cuit Court of
: : Georgia County.
HARRY CATTON, APPELLEE, :
:

JOHNS J:

Appellant, Walter E. Haller and Company, a corporation, began an action of assumpsit, in the circuit court of Peoria County, against appellee, Harry Gatton. The declaration consisted of the common counts, and a special count based upon the failure of appellee, under a written contract, to repurchase from appellant a certain used Rickenbacker automobile. Attached to the declaration was an affidavit of claim alleging that \$706.68 was due under the contract. Appellee filed the general issue with a notice of set-off consisting (1) of storage charges on the Rickenbacker automobile from May 13, 1926 to November 24, 1926, at \$1.00 per day; (2) storage charges on an Essex coach from March 2, 1926 to November 24, 1926 at \$1.00 per day; (3) \$192.24 paid by appellee. A jury returned a verdict in favor of appellant for \$400 and judgment was entered thereon. The principal ground for reversal urged by appellant is that the judgment should have been for the full amount of the claim.

Gatton was in the automobile business in Peoria and operated two garages. Appellant company was in the automobile finance business in Chicago, and had purchased notes and chattel mortgages on automobiles from Gatton at various times, aggregating many thousands of dollars. On January 16, 1926, Gatton sold to A.O. Bennett a used Rickenbacker automobile. The purchase price was \$1245.55 to which was added \$124.21 to cover certain charges and insurance, making a total of \$1369.76. Gatton allowed Bennett \$500 for an old car taken in on the trade, and Bennett and his

Appeal from the Circuit Court of
Georgia County

Appellant, Walter E. Heller and Company, a corporation, began an action of replevin, in the circuit court of Georgia County, against appellee, Harry Gatton. The declaration consisted of the common counts, and a special count based upon the failure of appellee, under a written contract, to repurchase from appellant a certain used Rickenbacker automobile. Attached to the declaration was an affidavit of claim alleging that \$706.68 was due under the contract. Appellee filed the general issue with a notice of set-off consisting (1) of storage charges on the Rickenbacker automobile from May 13, 1936 to November 24, 1936, at \$1.00 per day; (2) storage charges on an Essex coach from March, 1936 to November 24, 1936 at \$1.00 per day; (3) \$193.24 paid by appellee. A jury returned a verdict in favor of appellant for \$400 and judgment was entered thereon. The principal ground for reversal urged by appellant is that the judgment should have been for the full amount of the claim.

Gatton was in the automobile business in Georgia and operated two garages. Appellant company was in automobile finance business in Chicago, and had purchased notes and chattel mortgages on automobiles from Gatton at various times, aggregating many thousands of dollars. On January 16, 1936, Gatton sold to A.O. Bennett a used Rickenbacker automobile. The purchase price was \$1245.55 to which

wife executed to Gatton a note for \$869.76 secured by a chattel mortgage on the Rickenbacker car. The note was payable in monthly installments of \$54.36 each. Gatton assigned this note and mortgage, without recourse, to appellant for \$745.55 in cash. He also gave to appellant the written contract sued on in this case. This contract recited that in the event appellant took possession of the car securing the note, for any cause, Gatton would, within five days after demand by appellant, purchase such motor vehicle from appellant for cash for a sum not less than the amount due appellant, including interest, costs and expenses.

Bennett afterwards entered the employ of Gatton but remained only a short time and made no payments on the car. When he left such employment, he turned the car over to Gatton. Appellant admits that Gatton made three payments of \$54.36 each on this car, the last one being on May 8, 1926. Appellant claims that after allowing credit for these payments amounting to \$163.08, the balance of \$706.68 remained due, as set forth in its affidavit of claim attached to the declaration.

Sometime prior to the sale of the Rickenbacker car, Gatton sold an Essex coach to Mary A. LaBrier and Almon L. Palmer. The note and chattel mortgage given to secure the payment of a part of the purchase price were sold by Gatton to appellant. It is not claimed that there was any repurchase agreement as to this coach at the time of the sale. Default was made in the payments on the Essex coach and on March 2, 1926, appellant took possession of it and sent it to the garage of appellee, Gatton, where it remained for over eight months. Appellee claims that this car was brought to his garage without his knowledge and consent and that he had no interest in it; that on April 9, 1926, Viner, an agent of appellant, asked him if appellant could make any money out of the Essex coach and appellee replied that it could; that Viner said he would leave the car there

The appellant admits that Gatton made three payments of \$100 each on this date, the first two being made in 1935, and the third in 1936. The appellant also admits that Gatton made three payments of \$100 each on this date, the first two being made in 1935, and the third in 1936. The appellant also admits that Gatton made three payments of \$100 each on this date, the first two being made in 1935, and the third in 1936.

until it was sold; that appellee should fix it up; that appellant would sustain the loss on it; that appellee did some work on it and showed it to one or two prospective purchasers; that on April 14, 1926, he made a payment of \$144.18 on the Essex car and on May 8, 1926, another payment of \$48.06, making a total of \$192.24. It is claimed that appellee is entitled to set off this amount, because the payments were made through coercion and as a result of threats made by appellant to call all of appellee's loans amounting to about \$20,000, unless such payments on the Essex coach were made.

Roberts and Mendenhall, agents of appellant, testified that on May 11, 1926, they demanded of Clara L. Catton, wife and authorized agent of appellee, a repurchase of the Rickenbacker car and the payment of \$706.68, the balance due under the contract, and that she replied appellee had five days to take up the entire balance and would do so within that time. Mrs. Catton denied she had any conversation with these two witnesses on May 11, but testified that Catton had a conversation on that day with Viner, an agent of appellant; that Viner was tendered a check for one payment on the Rickenbacker, but he demanded a further payment on the Essex coach. Appellee then replied he would have to figure up on the Essex coach. Mrs. Catton further testified that on May 13 she had a conversation with Viner, Mendenhall and Roberts. At that time Roberts tendered her a written statement showing \$680 balance due on the Rickenbacker car, and demanded \$706.68. Appellee was not present at that conversation but was in Macomb. Mrs. Catton testified that she told Viner and Roberts that if five days' notice was served on the repurchase order on the Rickenbacker car, the matter would be taken into consideration by appellee. Catton testified that he offered Viner to keep up the payments on both cars until they were sold and he made payments on both cars. He attempted to prove an offer to

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repurchase the Rickenbacker car, provided appellant would reimburse him for the payments he had made on the Essex coach but appellant refused to accept the proposition.

The Rickenbacker car remained in appellee's garage from May 13, 1926 to November 24, 1926, a period of 195 days. The Essex coach was in the garage from March 2, 1926 to November 24, 1926, a period of 267 days. Appellee and his wife testified that the usual and customary charge for such storage was \$1.00 per day for each car. Five witnesses called by appellant testified that the usual and customary charge was from \$5.00 to \$10.00 per month per car. In October, 1926, appellee upon his own motion painted the Rickenbacker car at a cost of about \$100. It also appears indirectly from the evidence that sometime in September, 1926, appellant began an action of replevin against appellee for the Essex coach. The writ was served on appellee, who refused to tell the sheriff where the coach was and it remained in the possession of appellee. It also appears that the replevin action was still pending at the time of the trial in this case.

Before considering the questions presented on this appeal, we wish to say that the abstract filed by appellant does not comply with Rule 16 of this court, which provides that the evidence shall be given in narrative form so as to clearly present its substance. Several important items of evidence and rulings of the court are not shown by the abstract. These omissions have been supplied by an additional abstract filed by appellee. We would be justified in affirming this judgment upon the abstract filed by appellant, but we have not done so for the reason that there are several important questions which should be considered.

Appellant insists that the only question before the trial court was the liability of appellee, and the amount due, under the contract of repurchase of the Rickenbacker car, and that the items of set-off were improperly admitted in evidence.

...the defendant, provided appellant would
...him for the payments he had made on the Bank
...this appellant refused to accept the proposition.
...The defendant remained in appellant's car
from May 12, 1936 to November 24, 1936, a period of 105 days.
The Bank coach was in the garage from March 2, 1936 to Novem-
ber 24, 1936, a period of 287 days. Appellee and his wife
testified that the usual and customary charge for such storage
was \$1.00 per day for each car. Five witnesses called by
appellant testified that the usual and customary charge was
from \$5.00 to \$10.00 per month per car. In October, 1936,
...upon his own motion painted the defendant's car at a
cost of about \$100. It also appears indirectly from the evi-
dence that sometime in September, 1936, appellant began an
action of replevin against appellee for the Bank coach. The
writ was served on appellee, who refused to tell the sheriff
where the coach was and it remained in the possession of
appellee. It also appears that the replevin action was still
pending at the time of the trial in this case.
...Before considering the questions presented on this
appeal, we wish to say that the statement filed by appellant
does not comply with Rule 16 of this court. It provides
that the evidence shall be given in narrative form so as to
clearly present its substance. Several important items of
evidence and rulings of the court are not shown by
the statement. These omissions have been supplied by an
additional statement filed by appellee. We wish to point
out in affirming this judgment upon the statement filed
by appellant, but we have not done so for the reason
that there are several important questions which should
be considered.
Appellant insists that the only question before the
trial court was the liability of appellee, and the amount due,
under the contract of repurchase of the defendant's car, and
that the items of self-evident facts admitted in evidence.

Section 47 of the Practice Act provides that the defendant in an action upon a contract having claims or demands against the plaintiff, may plead the same, and the same, or such part thereof as the defendant shall prove on the trial, shall be set off and allowed against the plaintiff's demand and a verdict shall be given for the balance. A set-off is a counter-demand which the defendant holds against the plaintiff usually arising out of a transaction extrinsic of plaintiff's cause of action. (Luther v. Mathis, 211 Ill. App. 596) A plea of set-off amounts to a cross-action. (Waterman v. Clark, 76 Ill. 428.) A set-off can only be pleaded where there is an indebtedness from the plaintiff to the defendant which might be made the subject of an independent suit. (Litch v. Clinch, 136 Ill. 410; Postrom v. Becker, 172 Ill. App. 410.) Money paid under a mistake of fact may be set off in an action of assumpsit against the debt claimed to be due. (Bary v. Miblo, 155 Ill. App. 338; Commercial Union v. Scammon 133 Ill. 627; Devine v. Edwards, 101 id. 138.) Demands for work and labor performed, board furnished, goods sold and delivered, and for money due, are not unliquidated damages, and may be set off in an action ex contractu, whether they arise out of the subject matter of the plaintiff's suit or not. (East v. Crow 70 Ill. 91; Heenan Mercantile Co. v. Walter, 144 Ill. App. 279; Tartt v. Ramey 158 id. 468; Luther v. Mathias 211 id. 596.) Under these authorities the items of set-off concerning the Essex coach were proper subjects of proof by appellee.

Under the written contract of repurchase executed by appellee on the Rickenbacker car, it became the duty of appellee to repurchase the car for cash for a sum not less than the amount due appellant, upon appellant's taking possession thereof for any cause. Appellee contends that appellant never foreclosed its mortgage and did not take possession of the car and therefore had no right to require him to repurchase it. Bennett surrendered possession to appellee which he had

a right to do without a foreclosure. Appellee's possession of the car was for the benefit of appellant; the possession of appellee was in fact the possession of appellant, and we think the evidence shows it was so considered by both parties. Appellee contends that no written demand was made for payment. The contract did not provide for a written demand. It merely provided for a demand, and for payment within five days. It is admitted that a demand was made. Upon this demand being made, it became the duty of appellee to repurchase the car and pay the amount due, which under the preponderance of the evidence was \$706.68. Because of the failure of appellee to pay, he was in default, and a cause of action arose against him in favor of appellant. Appellant had a right at the expiration of five days from the date of the demand to treat the car as belonging to appellee and to sue for the repurchase price. If the car was the property of appellee, he was in no position to charge or collect storage upon it. If no set-offs were established it was the duty of the jury to bring in a verdict for the amount shown by the evidence to be due appellant on the repurchase price. The jury evidently took the view that appellee was liable for the repurchase of the car, otherwise there could have been no verdict against appellee for any amount. The verdict in this respect was correct, and appellee was not entitled to have storage charges on the Bennett car set off against the amount due, or to receive pay for repainting the car.

The note and mortgage evidencing the deferred payments on the Essex coach were sold to appellant. No repurchase agreement was executed. Appellee thereafter had no interest in the coach or the securities. When default was made in the payments, appellant took possession of the coach and sent it to the garage of appellee without his knowledge or consent, where it remained for 267 days. Storage is claimed for this period of time.

Up to May 8, 1926, appellee made payments on the coach amounting to \$192.24 which he insists he was compelled to pay in order to protect himself against the wrongful demands of appellant, and that he is entitled to set off this amount against appellant's claim. He had a right to establish this set-off by competent evidence if he could. The matter was in issue under the pleadings.

The coach belonged to appellant. At least it had taken possession of it under its mortgage. Appellee had no right, title or interest in it when it was placed in his garage. He repaired it and stored it for appellant, and we think he should be compensated to the extent of his reasonable charges. The trial court admitted evidence as to the storage charges, but refused to admit some of the evidence concerning conversations and dealings between appellant and appellee with reference to the ownership of the coach and the circumstances under which the payments were made. However, sufficient evidence is contained in the record to warrant the jury in allowing the set off. We think all of the proffered evidence should have been admitted. The amount allowed by the jury as set offs on account of payments and storage on the Essex coach was within the range of the proof. We have gone through the record very carefully and are convinced that substantial justice has been done. The errors of record will not justify a reversal and the judgment is therefore affirmed.

Judgment affirmed.

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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

248 LA. 688²

BE IT REMEMBERED, that afterwards, to-wit: On

MAR 23 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

| | | |
|---------------------------------|---|------------------|
| Ernest Brook as trustee, etc. | : | |
| and M.A. Carmack, Appellees, | : | |
| | : | Appeal from the |
| v. | : | Circuit Court of |
| | : | Lake County. |
| Pistakee Boat and Engine Co., | : | |
| et al, Pistakee Boat and Engine | : | |
| Co., | : | Appellant, |

Jones J:

This case involves the same principles and is between the same parties as cause Gen. No. 7794, heretofore decided by this court. The decree that was entered in favor of appellee, from which this appeal is prosecuted, involves the authority of the circuit court to tax as costs in a foreclosure proceeding, the sum of \$300, as a reasonable fee of complainant's solicitor for services performed upon the appeal to this court from the decree of foreclosure theretofore entered in the cause. The order provided "that said \$300 be paid, if not otherwise paid, out of the proceeds of the sale or sales of the premises mentioned in the original decree herein." The order further provided that the special master "shall, out of the proceeds of such sale, pay all of the costs of the said proceeding as directed in the original decree herein and that he pay to D.T. Smiley, solicitor for the said complainants, the said sum of Three Hundred Dollars (\$300) additional solicitor's fee allowed for the services as aforesaid in the Appellate Court for the complainants." No authority was presented in this case by appellee that supports the decree herein, and the opinion in Gen. No. 7794 between the same parties, is to be taken as governing this cause.

It is also to be observed that instead of the amount of the solicitor's fee being allowed to the complainant, it is ordered to be paid to D.T. Smiley, his solicitor. If the court had any authority to enter an order for the payment of a solicitor's fee, such fee should not have been made payable to the solicitor.

Appellant,
vs.
The People of the State of New York,
Respondent.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

The order should have been in favor of appellee and based on the amount paid by him to his solicitor, or the amount he was obligated to pay for the services rendered, and in either case must have been the usual, customary and reasonable fee for such services. Neither the decree of foreclosure, nor the order appealed from, contains any finding that the trust deed provided for the payment of any such fee as is in question here and the court had no power to allow it. The order of the circuit court is reversed.

Reversed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

240 LA 668³

BE IT REMEMBERED, that afterwards, to-wit: On

APR 6 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District.

October Term, A. D. 1927.

O. J. GOEHRING,

Appellee,)

vs.)

REUS STATE BANK, a Corporation,)
Appellant.)

Appeal from
Circuit Court
DuPage County.

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the Circuit Court of DuPage County, to recover the amount of a check, charged by appellant bank against the account of appellee, and which check appellee claims was a forgery.

Appellant has failed to abstract the pleadings, the affidavits of merit, the instructions other than the peremptory instructions, the motion for a new trial, and certain exhibits admitted in evidence. We would be warranted in affirming this judgment on the ground of the insufficiency of the abstract.

Gibler v. City of Mattoon, 167 Ill. 18-22; Barber v. Mellish-Wayward Co., 209 App. 299; Dunlap v. B. of R. T. 214 App. 376-378; Deterding v. C. I. P. S. Co., 223 App. 374-375-376. However, we have deemed best to consider the case on the merits.

An examination of the record discloses that the declaration consists of the common counts and one special count, accompanied by affidavit of merits, to which declaration appellant

APPELLATE COURT
Second District

October Term, A. D. 1927.

Appellant,
a Corporation,

OPINION BY BORGES, J.

An action in assumpsit was instituted by appellee against appellant in the Circuit Court of DuPage County, to recover the amount of a check, charged by appellant bank and on which no account of appellee, and which check appellee claims was

Appellant bank claims to have been cashed by appellee's cashier, and that appellee's cashier, in cashing the check, was negligent in not making proper investigation, and that appellee is liable to appellant for the amount of the check.

Appellant bank claims to have been cashed by appellee's cashier, and that appellee's cashier, in cashing the check, was negligent in not making proper investigation, and that appellee is liable to appellant for the amount of the check.

In examination of the record discloses that the decision of the common counts and one special count, second, is affirmed.

filed a plea of the general issue, with affidavit of merits. A trial was had, resulting in a verdict and judgment in favor of appellee for \$725. To reverse said judgment, this appeal is prosecuted.

Appellee is a contractor and builder, and from April 1924, to September 1925, he maintained a deposit and checking account at appellant bank. On July 16, 1925, appellant bank received from the Foreman National Bank of Chicago a check, bearing date July 13, 1925 payable "to the order of Bearer on demand", for \$725.00, drawn on appellant bank and signed A. J. Goehring. This check was stamped paid, was charged to appellee's account, and was delivered to appellee with the statement of his account. The principal matter in controversy in this case is as to whether or not the signature to said check is the signature of appellee.

On the trial appellee offered in evidence the check in question, and testified that the signature thereon was not his signature; that he had never signed the same and had never signed an instrument of like character. On behalf of appellant bank Valentine A. Dieter, its vice-president, Paul H. Boecker, its cashier, and Claude T. Grimes, its assistant cashier, testified to the effect that they were familiar with the signature of appellee, and that the signature on the check in question, in their opinion, was the genuine signature of appellee. In addition thereto, one James L. Ennis, a lawyer of Chicago, and formerly one of the paying tellers in the Merchants Loan & Trust Company of Chicago, testified that he had had considerable experience in the examination of signatures and had testified as an expert in numerous cases. After comparing the signature on the check in question with certain signatures admitted in evidence and which it was agreed were the genuine signatures of appellee, this witness testified that in his opinion the signature on said check was the signature

of the same person who wrote the signatures admitted to be the genuine signatures of appellee. The witness Boecker also testified that, some two weeks after the payment of said check, appellant bank received another check of similar character and, some question having been raised with reference thereto, he called on appellee, and inquired of him as to whether he had received anything for the check; that appellee stated he did not; "That he didn't know where that check came from, and I held it out to him and I said, 'That is your signature,' and he said, 'Yes, it is'. He further testified that he asked appellee if he had signed any papers for anybody in the last few days and that appellee replied that two men, solicitors for a contractors' journal or directory had called on him while he was at work and wanted him to allow his name to be placed in said directory, that they made some inquiry with reference to where he bought his materials, where he did his banking, and how much money he had in the bank; that he stated that, after giving this information, they asked him to sign at the bottom of the page they were writing on, and that he did so. Boecker further testified that he told appellee to go and see the state's attorney; that, a day or two thereafter, he, Boecker, Mr. Reuss, President of appellant bank, Mr. McDonald, an investigator in the State's Attorney's Office, and appellee were present in appellant bank; that Mr. McDonald asked as to what charge should be made against the two men in question and that appellee replied "forgery"; that McDonald said, "You can't charge them with forgery, that is your writing, is it not?" and that appellee replied, "Yes".

McDonald testified to the same conversation and stated: "There was some talk about the charge that was to be preferred against these people or this person (said solicitors), and I asked Mr. Reuss what charge they were going to prefer against this person, and I don't know whether Mr. Boecker or Mr. Goehring or Mr. Reuss

said 'forgery'. I don't know which one said that, and I said, 'Well, there is no forgery here, because the person who write the blue checks, pointing to these other checks, wrote this check here,' and then I said to Mr. Goehring, "This is your check, ' referring to exhibit 1, and he said--I am not sure whether he said 'that looks like my signature,' or 'it is my signature.' I am not positive of that."

Appellee testified in rebuttal that when asked as to whether the signature on said check was his, he said: "I told them it was not my signature, it looked like my signature but I never wrote my name on that piece of paper."

Counsel for appellant strenuously contend that the verdict of the jury is against the manifest weight of the evidence. The four witnesses who testified on behalf of appellant testified to their opinion as to the genuineness of the signature in question, while appellee testified as a fact, as to whether or not he signed the instrument in question. In addition to the oral testimony the jury had the exhibits in evidence which were admitted to contain the genuine signature of appellee, to compare with the signature on the check in question. It was also proper for the jury to consider as a circumstance the fact that the cashier of said bank took the check in question from the files of the bank to appellee, to inquire with reference to its genuineness, that the check was payable to bearer and that it stated thereon: "I hereby represent that I have the above amount on deposit with said bank or trust co., free from all claims and subject to this check on presentation."

In Laurance v. Goodwin, 170 Ill. 390, the court at page 393 says: "The real controversy is one of fact, and it is the province of the jury to decide on questions of fact. This court said in Illinois Central Railroad Company v. Giles, 68 Ill. 317: ' If any rule of this court can be so well established as to be

said 'forgery'. I don't know which one said that, and I said,

'Well, there is no forgery here, because the person who wrote the

blue checks, pointing to these other checks, wrote this check here,

and then I said to Mr. Goehring, "This is your check," referring

to exhibit 1, and he said--I am not sure whether he said 'that

looks like my signature,' or 'it is my signature.' I am not

positive of that."

"Appellee testified in rebuttal that when asked as to

whether the signature on said check was his, he said: "I told

them it was not my signature, it looked like my signature but I

never wrote my name on that piece of paper.

Counsel for appellant strenuously contended that the

verdict of the jury is against the manifest weight of the

evidence.

The court said:

"The evidence is as follows:

The instrument in question. In addition to the oral testimony the

jury had the exhibits in evidence which were admitted to contain

the genuine signature of appellee, to compare with the signature

on the check in question. It was also proper for the jury to

consider as a circumstance the fact that the

check was taken from the files of appellee.

To inquire with reference to its genuineness, that the check was

payable to bearer and that it stated thereon: "I hereby represent

that I have the above amount on deposit with said bank or trust co.,

free from all claims and subject to this check on presentation."

In Lanahan v. Goodyin, 170 Ill. 320, the court at page

323 says: "The real controversy is one of fact, and it is the

province of the jury to decide on questions of fact. This court

said in Illinois Central Railroad Company v. Giles, 68 Ill. 317:

'If any rule of this court can be so well established as to be

neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence and the facts and circumstances, by a fair and reasonable intendment, will authorize a verdict, notwithstanding it may appear to be against the strength and weight of the testimony.'" Citing Johnson v. Moulton, 1 Scam. 532; Stickle v. Otto, 86 Ill. 161; Louisville, Jacksonville & Chicago R. R. Co. v. Terhune, 50 Ill. 151; Roney v. Monaghan, 8 Ill. 85; O'Reilly v. Fitzgerald, 40 Ill. 310.

To the same effect are Saxton v. Drake, 191 App. 322-325; Buckingham v. Penny, 158 App. 182-184.

We are of the opinion and hold that the questions here involved were questions for the jury, and that the finding of the jury is not against the manifest weight of the evidence. That being true, we would not be warranted in reversing the judgment on that ground.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

nothing is to be done until the situation is clarified.

It is to be noted that the situation is not clear.

There is a possibility of a change in the situation.

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There is a possibility of a change in the situation.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2481A. 11084

BE IT REMEMBERED, that afterwards, to-wit: On

APR 6 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District.

February Term, A.D., 1928.

THE PEOPLE, ETC., ex rel, HOWARD)
HAUNGS, Petitioner for and on)
behalf of ROBERT C. HAUNGS,)
Defendants in Error,)
vs.)
HULDA PIERCE and PETER PIERCE,)
Plaintiffs in Error.)

Writ of Error to
the Circuit Court
of Peoria County.

OPINION by BOGGS, J.

On July 1, 1925, a petition for a writ of habeas corpus was filed in the Circuit Court of Peoria County by defendants in error, on relation of Howard Haungs, against plaintiffs in error, to obtain the custody of Robert Haungs. The petition avers in substance that relator is the father of said child and that respondents, the maternal grandparents "Detain and imprison him, and that he, the relator, is in a position to support and maintain his said child."

A writ was issued as prayed, to which writ the respondents filed their answer. Said cause was referred to the master. The evidence was taken and reported, and a hearing was had, resulting in a finding and judgment awarding said child to the relator. To reverse said judgment, this writ of error is prosecuted. It is the contention of counsel for plaintiffs in error that, on the evidence in the record, the order of the trial court awarding said child to the relators was erroneous.

In The

APPELLATE COURT OF ILLINOIS

Second District

February Term, A.D., 1938.

Writ of Error to
the Circuit Court
of Peoria County.

THE PEOPLE, ETC., ex rel, HOWARD
HAYES, Petitioner for and on
behalf of ROBERT G. HAYES,
Defendant,
vs.
JAMES HAYES and BUTLER HAYES,
Plaintiffs in Error.

OPINION BY BOGGS.

On this 11th day of February, 1938, the following writ of error was filed in the Circuit Court of Peoria County by defendant in error, as petitioner, against plaintiff in error, as respondent. The petition avers in substance that relator is the father of said child and that respondent, the maternal grandparents "Detain and imprison him, and that he, the relator, is a qualified elector and is entitled to the right of suffrage."

A writ of error was granted, and the following facts were stated: The respondent, as respondent, was a party to a hearing was held, resulting in a judgment against respondent, and the following facts were stated: To reverse said judgment, this writ of error is prosecuted. It is the contention of counsel for plaintiff in error that the evidence in the record, the order of the trial court awarding said writ to the respondent, is as follows:

The record discloses that the relator lives in a well-appointed six-room modern house in a suburb of Peoria where the surroundings are well fitted for the rearing of a family. He is a graduate of the Peoria High School and of the College of Civil Engineering of the University of Illinois, and at the time of said hearing, was forty-two years of age. From 1907 to 1924, he was continuously in the employ of Elliott and Harmon, an engineering firm of Peoria, at a salary beginning at \$125 per month and ultimately raised to \$250 per month. In February, 1925, he was elected Recorder or Secretary of Mohammed Temple, Mystic Shrine of Peoria, which organization comprises a membership of nearly 7,000, and was still acting in said capacity at the time of said hearing. In 1923 he was elected Eminent Commander, Peoria Commandery Knights Templars No. 3, and is a member of the Presbyterian Church of said city. On the hearing, a large number of business and professional men and women, who were more or less intimately acquainted with relator, testified that in their opinion he was a fit person to have the care and custody of his child. In addition to those who testified, it was stipulated that some thirty other well known citizens, business and professional men whose names and addresses were given, would also testify to the same effect.

The relator was married to Florence Pierce, daughter of respondents, in 1910 and on August 25, 1916, Robert Haungs, the child in question was born. About a year after the birth of said child, the mother died. On October 16, 1917, following the death of the mother, the child was taken to the home of the respondents, where he remained up to the time of the hearing of said cause.

The evidence on behalf of the relator is further to the effect that, from the time said child was placed in charge of the respondents, he had paid respondents for the care, support, etc., of said child, some \$30 per month up to January 1st, 1920, and

The record of the hearing is as follows: The hearing was held at the Peoria High School and of the College of Civil Engineering of the University of Illinois, and at the time of said hearing, was forty-two years of age. From 1907 to 1921, he was continuously in the employ of Elliott and Harmon, an engineering firm of Peoria, at a salary beginning at \$125 per month and ultimately raised to \$250 per month. In February, 1922, he was elected Recorder or Secretary of Mohammed Temple, Westie Shrine of Peoria, which organization comprises a membership of nearly 7,000, and was still acting in said capacity at the time of said hearing. In 1923 he was elected Raiment Commander, Peoria Commander Knights Templars No. 3, and is a member of the Presbyterian Church of said city. On the hearing, a large number of business and professional men and women, who were more or less intimately acquainted with the relator, testified that in their opinion he was a fit person to have the care and custody of his child. In addition to those who testified, it was stated that some thirty other well known citizens, business and professional men, whose names and addresses were given, would also testify to the same effect. The relator was married to Florence Pierce, daughter of respondents, in 1910 and on August 25, 1916, Robert Haines, the child in question was born. About a year after the birth of said child, the mother died. On October 15, 1917, following the death of the mother, the child was taken to the home of the respondents, where he remained up to the time of the hearing of said cause. The evidence on behalf of the relator is further to the effect that, from the time said child was placed in charge of the respondents, he had paid respondents for the care, support, etc., of said child, some \$30 per month up to January last, 1920, and

thereafter, until the filing of the petition in said cause, he paid them \$35 per month; that in addition thereto, he purchased certain clothing, paid doctor bills, etc., for said child, the exact amount of which the evidence does not disclose. In July, 1925, the relator remarried, and is now living in the home above mentioned. His present wife was at one time the teacher of the class in Sunday School to which said child belonged. She testified, over objections of plaintiffs in error to her competency, that she was willing to take said child into the home and to give it the care of a mother.

On the other hand the undisputed evidence is to the effect that the respondents are people of good reputation; the respondent, Peter Pierce being 73 years of age at the time of said hearing, the age of respondent Hulda Pierce not being given; that they were kind to said child and gave him a good home; that he was well clothed and was kept in a cleanly condition. Several of the teachers who had said child as a pupil testified that plaintiffs in error were good to him and that he had a good home. Several of the neighbors, who were familiar with the facts, testified to the effect that said child had a good home with his grandparents, that he was surrounded by Christian influences and was being sent to Sunday School as well as to day school.

Plaintiffs in error both testified to the effect that relator never paid them anything for the care or support of said child, up until the year 1924; that from then on until the beginning of the suit he paid them \$35 per month. They admit, however, that he had contributed to some extent in the purchasing of the clothing for said child.

The testimony of the realtor is diametrically opposed to that of plaintiffs in error as to the matter of contributions made by him for the support of said child prior to 1924. However, the

...in said cause, he ...
...that in addition thereto, he purchased ...
...paid doctor bills, etc., for said child, the ...
...amount of which the evidence does not disclose. In July, ...
1935, the rector remarried, and is now living in the home above ...
...class in Sunday School to which said child belonged. She testified ...
...of plaintiff in error to her competence, ...
that she was willing to take said child into the home and to give ...

On the other hand, the undisputed evidence is to the ...
effect that the respondents are people of good reputation; the ...
...Peter Pierce being 18 years of age at the time of ...
...said Pierce, was ...
...gave him a good home; that ...
he was well clothed and was kept in a cleanly condition. Several ...
of the ... who had said child as a pupil testified that ...
plaintiff in error was good to him and that he had a good home. ...
Several of the neighbors, who were familiar with the facts, testi- ...
fied to the effect that said child had a good home with his grand- ...
...that he was surrounded by Christian influences and was ...
being sent to Sunday School as well as to day school.

...plaintiff in error both testified to the effect that ...
...never paid them anything for the care or support of said ...
child, up until the year 1934; that from then on until the begin- ...
ning of the suit he paid them \$35 per month. They admit, however, ...
that he had contributed to some extent in the purchasing of the ...
clothing for said child.

The testimony of the rector is diametrically opposed to ...
that of plaintiff in error as to the matter of contributions made ...
by him for the support of said child prior to 1934. However, the

relator offered in evidence a book account kept by him, and which he testified was a book of original entry, showing the exact amounts which he claimed to have paid plaintiffs in error and the times at which the same were paid, and that the entries of said amounts were made by him in said book at the time the payments were made. Counsel for plaintiffs in error insist that the court erred in admitting said account. While the evidence fails to show that it was the character of account book that would be admissible in evidence as substantive proof, still we are of the opinion that, it was admissible and proper to be considered by the court in connection with the testimony of the relator. However, it should also be observed that, in a hearing before a court without jury, and where there are no propositions of law, the only question is as to whether the competent evidence in the record is sufficient to support the finding and judgment of the court. Schroder v. Harvey, 75 Ill. 638-641; Partridge v. Ryan, 134 Ill. 247; Palmer v. Meriden Britannia Co., 163 Ill. 508-518; People v. Askins, 200 App. 621; Rosenfeld v. Ehrhart, 202 App. 617.

Then, too, the question as to what payments the relator had made toward the support of his child is only important as showing his interest in his child and as tending to support his contention that he had not permanently surrendered his custody.

An exhibit offered in evidence by plaintiffs in error, executed when said child was seven years of age, provided that said child "shall continue to live with his grandparents so long as it is mutually agreeable to the parties herein concerned; that he shall return to his father when his grandparents became physically unable to care for him, or when a change of conditions shall occur; that his father shall pay his grandparents a reasonable amount from time to time for the care of said son; that his father shall bear the entire additional expense for clothing, wearing apparel, school supplies, doctor's fees, medicines and such other necessities for said son, which are required from time to time; that his son shall be permitted to accompany his father

relator offered in evidence a book which he said was a record of the payments made by the relator to the defendant, and that the same were paid, and

said book at the time the payments were made. The relator said that the book was a record of the payments made by the relator to the defendant, and that the same were paid, and

it was the relator's account book that would be paid. The relator said that the book was a record of the payments made by the relator to the defendant, and that the same were paid, and

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at such times as opportunities will permit, as has been the practice in the past, and that this agreement is solely for the purpose of establishing the present welfare of said son."

The record therefore discloses that, socially and otherwise, both the relator and plaintiffs in error were proper persons to have the care and custody of said child. In addition to the foregoing evidence offered by the relator, the evidence offered by him was further to the effect that plaintiff in error Hulda Pierce had stated on several occasions that the relator would probably remarry and would want his child. The testimony of the relator is to the effect that the placing of said child with plaintiffs in error was not to be permanent, and that he did not thereby relinquish its custody and control.

The only evidence even tending to show that the relator intended said child to permanently be in the home of plaintiffs in error is the testimony of the plaintiff in error Peter Pierce. He testified that when Robert was six years of age and ready to attend school, he told relator, "'If you intend to take him you can, now is the time, and start him to school around where you live. If he stays here, we will send him to Kingman School, naturally.' Howard studied a little bit and said, ' I never intend to disturb that boy as long as he can stay here, because he will never get a better home.' I told him, 'All right, we will send him to the Kingman School,' and he said the Kingman school was just as good as any school in Peoria." In rebuttal, the relator denied ever having made the statement to the effect that he expected to permanently leave the child with the defendants.

The only evidence derogatory ~~of~~ the conduct of relator toward his child is confined to that of plaintiffs in error and their son, Royal A. Pierce, and the child, Robert. The testimony of plaintiffs in error and of their son was to the effect that the relator did not visit the child as much as he should have; that he didn't give it presents as frequently as they thought he should

...the fact that the ...
...this statement is solely for the ...

...the witness, both the relator and plaintiff in error were proper ...
...In addition ...

...the foregoing evidence offered by the relator, the evidence ...
...furnished by him was further to the effect that plaintiff in error ...

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...probably remain and would want his child. The testimony of the ...
...relator is to the effect that the plaintiff of said child with ...
...plaintiff in error ... not to be born at, and that he did not ...

...The only evidence even tending to show that the relator ...
...said child to permanently be in the home of plaintiff in ...

...is the testimony of the plaintiff in error Peter Pierce, ...
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...old relator, "If you intend to take him for ...
...now is the time, and start him to school around where you ...

...live. If he stays here, we will send him to Kingman School, ...
...admittedly, Robert studied a little bit and said, 'I never intend ...

...to attend that school here, because he will ...
...all right, we will send ...
...Kingman school was ...

...In rebuttal, the relator ...
...made the statement to the effect that he ex- ...
...child to the defendant's ...

...conduct of relator ...
...toward the child ...

...The testimony ...
...of their own way to the effect that the ...
...relator did not ... that ...
...he didn't give ...

have, and that they had never seen him kiss or caress his child; that when the child had the pneumonia, the relator only stayed with him a short while and then left Peoria and was gone away several weeks. The child who was then nine years of age testified that the father never ~~kissed~~ him and didn't take him out automobile riding very often, although he did sometimes, and that when he came to see him he would only stay a few minutes as a general rule, and would leave him the pictures from the Sunday papers.

These witnesses however concede that except as to one or two occasions the relator visited his child practically every Sunday.

The evidence discloses that the relationship between relator and plaintiffs in error was friendly and without friction until the relator remarried, at which time plaintiffs in error did not look on his visits with their former favor, and refused to allow him to take the child to his home as he had done on former occasions.

The testimony in the record together with plaintiffs in error's exhibit clearly discloses that there never was any intention on the part of the relator to permanently surrender the custody and control of his child.

As the evidence discloses that the relator is a fit person to have the care, custody and control of his child, The question then arises as to what are the rights of the parties to this proceeding.

"The rights of the ⁿparent are superior to those of any other person, when that parent is a fit person to have the custody of children and is so circumstanced that he can provide the necessities of life and administer to the requirements of such a charge." Gormak v. Mitchell, 211 Ill. 519-523; Sullivan v. People, 224 Ill. 468-476; Woolford v. Burckhardt, 141 App. 321-324; People v. Siens, et al, 198 App. 342-344; People v. Nelson, 235 Ill. 410-415.

The relator possesses all of the qualifications laid

child; and the child was then taken to the home of the mother.

The mother then stayed with the child for a period of several weeks.

The child was then taken to the home of the mother and was gone away.

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until the plaintiff in error was married, at which time plaintiff in error did

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this proceeding.

"The rights of the parent are superior to those of any

other person, when that parent is a fit person to have the custody

of children and is so circumstanced that he can provide the neces-

saries of life and administer to the requirements of such a charge."

People v. Sullivan, 224 Ill. 11. 219-223; People v. Sullivan, 224 Ill.

People v. Sullivan, 224 Ill. 11. 219-223; People v. Sullivan, 224 Ill.

People v. Sullivan, 224 Ill. 11. 219-223; People v. Sullivan, 224 Ill.

The relator possesses all of the qualifications laid

down in the foregoing authorities. He has a good home in a good neighborhood, his social standing is high, and he has the financial ability to take care of his child. He is in the prime of life, and is in a position to give the advice and counsel which a son needs from a father. While plaintiffs in error are fine people and have a genuine affection for the child, yet the weight of years cannot but affect their ability to give said child the active, attention and direction that he should have at his age of life. We do not regard it as especially important that the child, then only nine years of age, should have expressed his desire to live with his grandparents. That was natural under the circumstances. If, however, the father wisely and affectionately takes over the direction and control of his child, he will soon gain his affection and confidence, and in the end will make for him the character of home he ought to have.

Finding no error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

neighborhood, and the father's ability to take care of his child. He is in the position to give the advice and counsel which a son needs from a father. While plaintiffs in error are fine people and have a genuine affection for the child, yet the weight of years, and their ability to give said child the active attention and direction that he should have at his age of fifteen, We do not regard it as especially important that the child, then only nine years of age, should have expressed his desire to live with his grandparents. That was natural under the circumstances. If, however, the father wisely and affectionately takes over the direction and control of his child, he will soon gain his affection and confidence, and in the end will make for him the character of home he ought to have.

Finding no error in the record, the judgment of the trial court will be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Alfred

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2481A.008⁵

BE IT REMEMBERED, that afterwards, to-wit: On

APR 6 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

February Term, A.D., 1928.

OPINION By BOGGS, J.

An amendment of this character is warranted at any time during the proceeding. No surprise was occasioned appellant thereby, and the court properly allowed said amendment without imposing terms.

Appeal from
County Court
DeKalb County.

WILLIAM BEHRENS and EDWARD
TRENWORTH, co-partners doing
business as Behrens & Trenchard
Appellees

vs.

WILLIAM O'BRIEN,
Appellant.

OPINION BY ROGE

Suit was instituted by appellees against appellant before a Justice of the Peace to recover the purchase price of a Deering binder sold to appellant. On appeal to the County Court, a jury was waived and a trial was had before court, resulting in a finding and judgment in favor of appellees for \$100.00 over and above \$140. that had been tendered. To reverse said judgment, this appeal is prosecuted.

No complaint is made as to the rulings of the court on the propositions of law. The first ground urged by appellant for a reversal of said judgment is that the court erred in permitting appellees, after the hearing of said cause and after the court had announced its finding, to substitute "William Behrens and Edward Trenchard, co-partners doing business as Behrens & Trenchard," as plaintiffs instead of "Behrens and Trenchard," as the suit was originally brought, without imposing terms.

An amendment of this character is warranted at any time

imposing terms.

The principal ground relied on for a reversal of said judgment is that the finding and judgment of the court is against the manifest weight of the evidence.

The record discloses that George, Walter and Frank O'Brien, sons of appellant, called at the place of business of appellees, who are implement dealers, in July, 1926, and inquired with reference to the price, etc., of a McCormick-Deering binder. Appellees had on hand a Deering binder, which they testified they offered for \$230., being \$15. less than the regular retail price; that no sale was made that day; that, some time thereafter, George O'Brien and Dennis O'Brien, his uncle, called at appellees' place of business, and purchased for appellant, the Deering binder in question, for \$230., with a cover for \$10., making a total of \$240.; that no payment was made at the time of the delivery of the binder, and that some time after harvest, appellant, made a tender of \$140. for the binder and cover; which tender they refused.

Appellant's three sons who first called on appellees testified to having had a conversation with appellee Freundt with reference to the binder in question, and that he, Freundt, offered the binder to them for \$130; that, a question being raised as to why it was so much under the ordinary price, Freundt replied in effect that it was not Deering territory and they wanted to get rid of the binder and were accordingly making a price of \$130; that no sale was made on that date, but thereafter appellant purchased said binder through George and Dennis O'Brien, for \$130., with \$10. for the cover, making \$140.; that she tendered said amount, and, on the same being refused, she had deposited the same with the county clerk.

Four witnesses testified on behalf of appellant to the effect that the contract price for the binder and cover was \$140. Appellees and one Steinhauer, a traveling salesman for the International Harvester Company, testified that the price made to appellant for said binder was \$230, with \$10. for cover. The

The principal ground relied on for a reversal of said judgment is that the finding and judgment of the court as to the manifest weight of the evidence.

The record discloses that George, Walter and Frank O'Brien, sons of appellant, called at the place of business of appellees, who are implement dealers, in July, 1922, and indulged with reference to the price, etc., of a McCormick-Deering binder. Appellees had on hand a Deering binder, which they testified they offered for \$230., being \$15. less than the retail price; that no sale was made that day; that, some time thereafter, George O'Brien and Dennis O'Brien, his wife, called at appellees' place of business, and purchased for appellant, the Deering binder in question, for \$230., with a cover for \$10., making a total of \$240.; that no payment was made at the time of the delivery of the binder, and that some time after harvest, appellant, made a tender of \$140. for the binder and cover, which, however, they refused.

Appellant's three sons who first called on appellees testified to having had a conversation with appellee Trownt with reference to the binder in question, and that he, Trownt, offered the binder to them for \$130; that, a question being raised as to why it was so much under the ordinary price, Trownt replied in effect that it was not Deering territory and they wanted to get rid of the binder and were accordingly making a price of \$130; that no sale was made on that date, but thereafter appellant purchased said binder through George and Dennis O'Brien, for \$130., with \$10. for the cover, making \$140.; that she tendered said amount, and, on the same being refused, she had deposited the same with the county clerk.

Four witnesses testified on behalf of appellant to the effect that the contract price for the binder and cover was \$140. Appellees and one Steinhauser, a traveling salesman for the International Harvester Company, testified that the price made to appellant for said binder was \$230, with \$10. for cover. The

evidence is sharply conflicting. That being the state of the record, we would not be warranted in reversing the judgment, unless we were able to say that the finding of the court was against the manifest weight of the evidence. This we are unable to do.

A trial court's finding, where a jury has been waived, is to be given the same effect as the verdict of a jury, and will not be distrubed unless manifestly against the weight of the evidence. Gratiot St. Warehouse Co., v. St. L. & T. E. R. R. Co., 122 App. 405-407, affd. in 221 Ill. 418; Broderick v. O'Leary, 112 App. 658; People v. Eagan, 241 App. 189-196-197.

In our opinion the testimony, taken with the facts and circumstances proven on the trial, supports the finding and judgment of the court.

It is also contended that the court erred in admitting in evidence the invoice showing the wholesale price of said Deering binder.

The record discloses that appellant was insisting that said binder was one that had been on hands for some time, and that that was the reason appellees were making the alleged price of \$130. on it. The invoice discloses that the Deering binder was billed to appellees in May, 1925, preceding the July in which the same was sold to appellant. This was a circumstance tending to show that the same had not been on hands for any length of time, and tending to show there was no occasion for the making of a price to appellant on said machine, which was considerably less than the wholesale price paid by appellees. The record also discloses that said invoice was not offered in evidence for the purpose of showing the wholesale price of said binder, but for the purpose of showing that it had only been billed to appellees about two months before the sale was made to appellant.

Where, however, a case is tried before a court without a jury, the finding of the court will not be distrubed on appeal where the competent evidence in the record is sufficient to sustain

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112 App. 658; People v. ... 188-192-197.
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to be given the same effect as the verdict of a jury, and will
A trial court's finding, where a jury has been waived, is
to do.

against the manifest weight of the evidence. This we are unable
unless we were able to say that the finding of the court was a-
record, we would not be warranted in reversing the judgment,
without as to the state of the

the judgment of the court. Schroder v. Harvey, 75 Ill. 638-641;
Partridge v. Ryan, 134 Ill. 247; Palmer v. Meriden Britannia Co.,
188 Ill. 508-518; People v. Askins, 200 App. 621; Rosenfeld v.
Ehrhart, 202 App. 617.

For the reasons above set forth, the judgment of the
trial court will be affirmed.

Judgment affirmed.

THE JOURNAL OF THE
AMERICAN MEDICAL ASSOCIATION
PUBLISHED WEEKLY
CHICAGO, ILL., U.S.A.
1914, Vol. 11, No. 1
PUBLISHED BY THE AMERICAN MEDICAL ASSOCIATION
535 N. Dearborn Ave., Chicago, Ill.
Subscription price, \$5.00 per annum in advance.
Single copies, 15 cents.

CONTENTS

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

243 1A 689

BE IT REMEMBERED, that afterwards, to-wit: On

APR 8 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

February Term, A. D., 1928

PRODUCE DISTRIBUTORS COMPANY,)
a corporation)
Appellee,)
vs.)
CLARA GEANOPOLOS)
Appellant.)

Appeal from
Circuit Court
Winnebago County.

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee in the Circuit Court of Winnebago County against appellant and one William Geanopolos as copartner, doing business under the name of "State Market," to recover for goods alleged to have been sold by appellee to said parties.

On the trial of said cause, the court directed a verdict in favor of William Geanopolos, he having been adjudged a bankrupt and a verdict was returned against appellant for \$1,949, on which judgment was rendered. To reverse said judgment, this appeal is prosecuted.

The declaration consisted of one special count and the common counts, with affidavit of merits. Appellant filed a verified plea thereto denying partnership and a plea of the general issue.

The principal ground relied on for a reversal of said judgment is that the verdict is against the manifest weight of the

In The
APPELLATE COURT OF ILLINOIS
Second District

February Term, A. D. 1928

Appeal from
District Court
Winnebago County.

PRODUCE DISTRIBUTORS COMPANY,
a corporation
(Appellee)
vs.
JAMES J. BOGGS,
Appellant.

OPINION BY BOGGS, J.

In this case the plaintiff, James J. Boggs, brought an action in the District Court of Winnebago County against appellee and one William J. Boggs, doing business under the name of "State Producers as copartner, doing business under the name of "State Producers," as parties to the action. The action was brought to said parties.

On the trial of said case, the jury returned a verdict in favor of appellee, and the court rendered judgment in favor of appellee and against appellant. The jury also rendered a verdict in favor of appellee and against appellant. To reverse said judgment, this appeal is presented.

The plaintiff, James J. Boggs, with affidavit of merits. Appellant filed a verified plea denying the partnership and a plea of the general issue.

The principal ground relied on for a reversal of said judgment is that the verdict is against the manifest weight of the evidence.

evidence, it being the contention of counsel that the evidence fails to show the existence of a partnership between appellant and the said William Geanopolos. Counsel further contend that the market in question was owned and operated by William Geanopolos as his own individual property, and that appellant had no interest therein.

The undisputed evidence in the record discloses that in the month of February, 1919, appellant purchased from one Nick Psofas a grocery store and market known as the "State Market," in the City of Rockford; that she paid therefor \$3,000, a part of which she paid in cash; for the remainder she gave her individual note, which she afterward paid. Francis Conway, a traveling salesman, testified that on one occasion he was in said market and remarked that it was hard to make collections, and that appellant said if her husband gave any credit, she would close his doors. One Ed Hayes, a real estate man testified that "Mrs. Geanopolos asked me to get a buyer or to sell or dispose of it (said market). She told me to go ahead and bring the buyer in." Harry Filson, a real estate man, testified: "I saw Clara Geanopolos at the store, acting in the capacity of a clerk or proprietor. William said they would sell the place, and so did Clara. Clara said, 'If you have a customer or buyer, bring him in.' She said the purchase price was on inventory and fixtures, by agreement." Mary Hartman, a customer of the store, testified: "I saw Clara put up goods on the shelf. She came to the store, took money out of the register. William asked her what she was going to do with it and she said she was going down to the bank and deposit it. William said, 'Don't take it all--leave me a little.' Well, she said, 'It was as much hers as it was his--she could do what she wanted with it.' She put the money in her purse and went out." Harry G. Webber, an insurance man, testified in reference to a

evidence, it being the contention of counsel that the evidence fails to show the existence of a conspiracy between appellant and the said William Geanopolos. Counsel further contends that the market in question was owned and operated by William Geanopolos as his own individual property, and that appellant had no interest therein.

The undisputed evidence in the record discloses that in the month of February, 1919, appellant purchased from one Nick Paskas a jewelry store and market known as the "State Market," in the City of Newark; and she paid therefor \$8,000, a part of which she paid in cash; for the remainder she gave her individual note, which she afterward paid. Francis Conway, a traveling salesman, testified that on one occasion he was in said market and remarked that it was hard to make collections, and that appellant said if her husband gave any credit, she would close his doors. One Ed Hayes, a real estate man testified that "Mrs. Geanopolos asked me to get a buyer or to sell or dispose of it (said market). She told me to go ahead and bring the buyer in." Harry Wilson, a real estate man, testified: "I saw Clara Geanopolos at the store, acting in the capacity of a clerk or proprietor. William said they would sell the place, and so did Clara. Clara said, 'If you have a customer or buyer, bring him in.' She said the purchase price was on inventory and fixtures, by agreement." Harry Hartman, a customer of the store, testified: "I saw Clara put up goods on the shelf. She came to the store, took money out of the register. William asked her what she was going to do with it and she said she was going down to the bank and deposit it. William said, 'Don't take it all--leave me a little.' Well, she said, 'It was as much as it was worth--I was going to sell it.' She put the money in her purse and went out." Harry C. Leber, an insurance man, testified in reference to a

policy that he was writing on said store, that "Bill said to have the insurance policy in both their names. Clara was right beside him. I didn't talk to Clara and she didn't talk to me. She talked to Bill; I do not know what she said," Thomas L. Sizer, cashier of the Forest City National Bank, testified that an account was opened in his bank as "State Market" and that Clara Geanopolos wrote on the signature card "State Market" and her name, and that William Geanopolos also placed his signature thereon.

The business was in the main operated by William Geanopolos. He did the purchasing of the goods therefor, and conducted it as Bill's Place, but the account in the bank remained as it had been opened, the "State Market", the signatures being those of William Geanopolos and Clara Geanopolos.

Counsel for appellant insist that there should have been some proof, either of a written contract or an oral agreement between said parties showing a partnership, and that the facts and circumstances shows in this case were not sufficient to warrant the jury in finding that a partnership relation existed between appellant and her husband.

In Haug v. Haug, 193 Ill. 645, the court at page 647, in discussing a question of this character, says:

"There is no evidence in the record of any express contract of partnership, or written agreement of partnership, between the parties. It is well settled, however, that written articles of agreement are not necessary to constitute a partnership, but that a partnership may exist under a verbal agreement. (Bopp v. Fox, 63 Ill. 540.) The existence of a partnership may be implied from circumstances. (Keeleher v. Tisdale, 23 Ill. 409.) A partnership may arise out of an arrangement for a joint business, wherein the word 'partnership' may not have been used. If there was such a joinder of interests and action as the law will consider

William Oestrop also placed his signature thereon.

wrote on the subject of "State Market" and her name, and that
opened in his name as "State Market" and that Clara Jenson
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the fact is that the appellant was not a member of the Communist Party at the time of the trial and that the evidence presented at the trial was not sufficient to establish that he was a member of the Communist Party at the time of the trial.

There is no official in the name of any express com-
treat of partnership, or written agreement of partnership, between
the parties. It is well settled, however, that written articles
of a partnership are not necessary to constitute a partnership, but
that a partnership may be formed by the conduct of the parties.
See, e.g., Restatement (Second) of Torts, § 386, and
cases cited therein.

as equivalent and regards as in effect constituting a partnership, it will give to the persons so engaged all the rights, and lay upon them all the responsibilities, and to third persons all the remedies, which belong to a partnership."

And in Field v. Eilers, 103 App. 374, the court at page 377, says:

"The joint 'enterprise' of Dazey and Eilers could certainly be inferred by a jury from the evidence as it stood, for Dazey furnished the money and Eilers furnished the labor in the purchase of the hogs. And if there was no understanding between Dazey and Eilers as to the hogs shipped, a jury would have the right to draw the conclusion that they were interested in the 'joint profits' of the business; Eilers was probably not buying hogs for the love of physical exercise or for mere mental training. And, if they were interested in the joint profits, the jury would also be authorized to find, that although there was no understanding between them, a 'community of interest' existed in the hogs. Fouger v. First National Bank of Chicago, 141 Ill. 124; State Nat. Bank v. Butler, 149 Ill. 575."

In view of the fact that the record discloses that the money for the purchase of the market was all furnished by appellant; that the account in the bank was opened as the "State Market", the signatures being those of William Geanopolos and of appellant and that the insurance was taken out in their joint names and that they were both offering said premises for sale, we hold that the jury were warranted in finding that appellant and her husband were jointly interested in the business in question, and that, as to third parties, they sustained the relationship of partners and were severally liable for the indebtedness incurred in and about said business.

It is next contended that the court erred in refusing to

as equivalent and... it will give to the... upon these all the... remedies, which... And in Field v. Wells, 100 App. 374, the court at page

377, says:

"The joint 'enterprise' of Dasey and Eilers could certainly be inferred by a jury from the evidence as it stood, for Dasey furnished the money and Eilers furnished the labor in the purchase of the hogs. And if there was no understanding between Dasey and Eilers as to the hogs shipped, a jury would have the right to draw the conclusion that they were interested in the 'joint profits' of the business; Eilers was probably not buying hogs for the love of physical exercise or for mere mental training. And, if they were interested in the joint profits, the jury would also be authorized to find, that although there was no understanding between them, a 'community of interest' existed in the hogs. Forner v. First National Bank of Chicago, 141 Ill. 123; State Nat. Bank v. Butler, 149 Ill. 575."

In view of the fact that the record discloses that money for the purchase of the market was all furnished by appellant; that the account in the bank was opened as the "State Market", the signatures being those of William Gensopol and of appellant and that the insurance was taken out in their joint names and that they were both officers and directors of the bank, it is not surprising that they were warranted in thinking that the bank was their joint property and that they jointly interested in the business as well as the bank, as to third parties, they claimed the bank as their joint property and were revocably liable for the bank's obligations to third parties. It is well established that the bank was a partnership.

give the one refused instruction, offered by appellant. We have examined said instruction, and do not think it states a correct principle of law. The court did not err in refusing the same.

It is also contended that the court erred in its rulings on the evidence. In this connection counsel for appellant insist that the court erred in allowing appellee to place appellant on the stand as its witness, and to examine her with reference to depositions which she made in the bank to her own credit during the time the business in question was being operated. While probably the court might well have sustained the objections to said testimony, at the same time we do not think, under the evidence in the record, any serious error was committed.

While counsel for appellant assigned errors on the rulings of the court on the instructions, no complaint was made with reference thereto in the argument, except as to the refusal of the one instruction above referred to. The court fully submitted to the jury, in the instructions offered by appellant, the question as to whether or not appellant was jointly interested with her husband in the business in question, and gave all of the instructions offered by appellant in this connection.

It is also insisted by counsel that the court erred in stating, in the presence of the jury during the trial of said cause: "They have shown that these defendants (appellant and William Geanopolos) were running the State Market in some form or other." The remark should not have been made; however, counsel are not in a position to complain, for the reason that the remark was not excepted to, and court was not requested to direct the jury to disregard the same.

Other errors are assigned on the record, but counsel for appellant failed to argue the same in his brief and argument. Such

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

It was also suggested that the copy of the letter from the appellant's counsel to the court dated May 10, 1967, which was submitted by the appellant's counsel, was not a true and correct copy of the original letter. In this connection counsel for appellant stated that the court erred in allowing appellee to place appellant on the stand as its witness, and to examine her with reference to the telephone calls which she made in the bank to her own credit during the time the business in question was being operated. While no doubt the court might well have sustained the objections to said testimony, at the same time we do not think, under the evidence presented, any reversible error was committed.

[illegible][illegible]

Other officers were called to examine the same in his brief and statements.

errors are therefore, under our rules, taken as waived.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

There are several, and the first, which is the
first of the series, and the second, which is the
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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



11-10-28

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

243 I.A. 669²

BE IT REMEMBERED, that afterwards, to-wit: On

APR 6 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Joseph Szold and Jacob Szold, doing :
business as partners under the name :
and style of Jos. Szold & Son, : Writ of Error to
Defendants in Error, : the Circuit Court of
v. : Peoria County,
Myrtle Smith, : Illinois.
Plaintiff in Error, :

Jones J:

Plaintiffs, Szold & Son, copartners, recovered a judgment on a directed verdict for \$1195.18 against the defendant for a trespass and resulting damages to the plaintiffs' close. This cause was before this court at a former term and we reversed and remanded a judgment in favor of the defendant, Myrtle Smith. (Szold v. Smith 229 Ill. App. 66.)

The declaration charged the breaking of plaintiffs' close, and the destruction with an automobile of certain plate glass windows. At the first trial, the defendant filed the general issue and two special pleas. The first special plea averred that the automobile with which the windows were broken was not her property, and was not then under her control or operated by her or her servants. The second special plea averred due care on her part and that the injury was unavoidable. A demurrer to the second special plea was sustained. The cause was tried upon the general issue and the first special plea. With the pleadings in that state, evidence was admitted tending to show the defendant was not guilty of negligence and that the trespass was unintentional. The judgment of the trial court was reversed and the cause remanded.

The facts are set forth in our former opinion. We then held that the action of trespass, being one for a violation of a property right, does not depend upon the intent of the wrongdoer, or upon negligence. Plaintiffs' case was complete when the proof established the fact of the breaking of the close and the resulting damage. It was then incumbent

of the glass and the resulting damage. It was then incriminated

upon the defendant to show a justification and it must be specially pleaded.

When the cause was redocketed in the circuit court, the defendant again filed the same second special plea, to which a demurrer was sustained. By leave of court, she filed an amended second special plea. By this plea it was averred that the defendant at the direction of Leroy Smith, drove an automobile to the Wilmo Garage on Adams Street in the city of Peoria, located fifty feet south of the close of the plaintiffs, to have a leak in the heater of the automobile repaired by one Ray J. Karl, who was in charge of the garage; that when she arrived in front of the garage she stopped the car and its engine and placed the shift lever in neutral, got out of the car and requested Karl to repair the heater; that he took up some of the floor boards of the car, and without her knowledge shifted the lever into reverse; that at his request she got into the car and started the engine so that he could see if the leak in the heater had been mended; that she did not know that the lever had been shifted into reverse, and could not ascertain that fact by reasonable care and caution; that because of being in reverse, the car shot backwards and up on to the sidewalk, and against the close of plaintiffs, while she was in the car and in the exercise of all due care and caution to prevent injury to the close of the plaintiff. A demurrer was sustained to the amended plea, leaving the pleadings the same as at the former trial.

On the trial the plaintiffs proved the trespass and the resulting damage to the amount of \$1195.18, being the cost of replacing the glass broken. The defendant then sought to prove that she brought the car to the garage and left the shift lever in neutral and turned off the ignition; that Karl started to work on the car and she walked away and was looking in the store windows; that Karl called her back, and when she came back he was holding up certain of the floor boards in the

1. 1940-1941
2. 1942-1943

at the time she was called back to the floor boards in the
room; that Karl called her back, and when she

front of the car and told her to get in and step on the starter; that without her knowledge, Karl had shifted the lever into reverse; that she got into the car and as she stepped on the starter, Karl turned on the ignition switch and the car shot backwards and committed the injury and damages complained of, without any steering or action on her part, and that she was in a faint a part of the time while the car was running backwards.

A number of questions were asked the witness with a view of showing the trespass was not committed by reason of any negligence or intent on her part. The court refused to admit the offered testimony. At the close of all the evidence, the trial court directed a verdict in favor of the plaintiffs in the sum of \$1195.18, and judgment was entered upon the verdict.

It is contended by the defendant that the court erred in sustaining the demurrer to her amended second special plea, and in refusing to admit the offered testimony. Under the pleading the issue was the same as on the former trial, and there was no plea under which any evidence could properly be admitted other than the plea of not guilty. Both of the pleas to which demurrers were sustained aver that the defendant was in the car and started it when it ran backwards and did the damage complained of. Where an injury is the immediate consequence of a wrongful or negligent act, the doer of the act is liable in trespass whether the act was intentional or unintentional. A trespass is not excused by a mistake either of law or fact. An act may amount to a trespass though the result was wholly unintended. (26 R.C.L. Trespass Sec. 7.) The holding of this court on the former appeal is to the same effect, and the trial court followed the direction of this court in refusing the offered testimony.

For the same reason, the demurrer to the amended second special plea was properly sustained. All the contentions of plaintiff in error were settled adversely to her by the former opinion of this court. The trespass and damages having been es-

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tablished and there being no plea or evidence of justification it was proper to direct a verdict for defendants in error and the judgment of the circuit court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

110-1000

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

24011A. 669³

BE IT REMEMBERED, that afterwards, to-wit: On

APR 1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Joseph E. Daily, Appellee, :
v. : Appeal from the
Circuit Court of
Peoria County.
F. J. Williams, Appellant, :

Jones J:

Joseph E. Daily recovered a judgment by confession for \$15,920 against F. J. Williams, in the circuit court of Peoria County on a note, dated February 12, 1925, and originally payable to F. E. Daily, but assigned to plaintiff. The judgment was entered November 6, 1925, and a transcript of it was filed in the office of the clerk of the circuit court of Cook County. Execution was there issued, but never served on appellant.

Joseph E. Daily filed a creditor's bill to the September term, 1926, of the circuit court of Cook County against Williams. Service was had, and thereupon Williams filed an answer and a cross bill. The record before us does not show the allegations of the creditor's bill or of the cross bill. But we glean from an affidavit filed by Williams in the circuit court of Peoria County that the purpose of his cross bill in Cook County was to set aside the judgment. A demurrer to the cross bill was sustained on March 28, 1927. Thereafter, on April 11, 1927, Williams filed a motion in the circuit court of Peoria County to vacate the judgment by confession. On a hearing, the court considered not only the affidavit filed by Williams in support of his motion, but also a counter-affidavit filed by Daily and two affidavits in rebuttal thereof. The counter-affidavit and the rebuttal affidavits related solely to the question of diligence of Williams in seeking to vacate the judgment.

By his affidavit, it is disclosed that he first obtained notice of the entry of the judgment when he was served with summons in the Cook County proceeding and prior to September, 1926. He seeks to excuse his long delay in filing

Appeal from the
Circuit Court of
Georgia County.

1111

Joseph H. Daily recovered a judgment by confession for \$15,920 against F. J. Williams, in the circuit court of Georgia County on a note, dated February 12, 1925, and original-
ly assigned to J. H. Daily, but assigned to J. H. Daily entered November 6, 1925, and assigned to J. H. Daily in the office of the clerk of the circuit court of Georgia County. Execution was there issued, but never served on F. J. Williams.

Joseph H. Daily filed a creditor's bill in the Georgia County Circuit Court, in which he sought to recover from F. J. Williams the amount of the note, and also the amount of the interest thereon. The bill was filed before the record before us was made. The bill was filed in the Georgia County Circuit Court, and was assigned to J. H. Daily. But we agree that the bill was filed in the Georgia County Circuit Court, and was assigned to J. H. Daily. A cross bill in Georgia County was to set aside the judgment. A counter to the cross bill was sustained on March 28, 1927.

Thereafter, on April 11, 1927, Williams filed a motion in the circuit court of Georgia County to vacate the judgment by confession. On a hearing, the court considered not only the affidavit filed by Williams in support of his motion, but also a counter-affidavit filed by Daily and two affidavits in rebuttal thereof. The counter-affidavit and the rebuttal affidavits raised questions of diligence of Williams in bringing his motion for judgment.

By the majority of the court it was disclosed that he first obtained notice of the judgment in the Georgia County Circuit Court with summons on the 11th day of March, 1927, and that he failed to appear at the trial on the 11th day of March, 1927.

his motion in Peoria County by showing that he had undertaken to have the judgment set aside by means of his cross bill in Cook County. The general rule is that an application to open up or set aside a judgment should be made at the earliest opportunity. (Hall v. Jones, 32 Ill. 28.)

A motion to open up a judgment by confession and for leave to plead is analagous to a motion to vacate a judgment obtained by default, and the rule as to laches in default cases is applicable. (Kesner v. Truax, 195 Ill. App. 285; Sternberger v. Wright 239 id. ⁴⁹⁰~~409~~.) It is true that mere delay in filing a motion to vacate a judgment by confession will not always bar the right to have it set aside, but unreasonable delay in the absence of an excuse therefor will bar such right in all cases. It therefore becomes a question here whether the effort of the judgment debtor to have the judgment set aside in Cook County is a sufficient excuse for his having waited at least seven months before filing his motion in Peoria County. He was represented by counsel and chose his own forum and adopted his own method of procedure. There can be no doubt that the judgment entered in the circuit court of Peoria County could not be attacked or reviewed in a collateral proceeding in the circuit court of Cook County. It has long been the settled law that judgments and decrees, however erroneous, of courts having jurisdiction, are final and conclusive between the parties until reversed in a direct proceeding in the manner provided by law, and cannot be attacked collaterally. (Sheahan v. Madagin 275 Ill. 372.) The jurisdiction of a court over a judgment which it has rendered is not lost by filing a transcript thereof in another court or county. (15 Ency. Pleading & Practice, Judgments, 229.)

No question as to the jurisdiction of the circuit court of Peoria County to enter the judgment is raised or suggested as an explanation for the attempt to set aside the judgment by a cross bill in the circuit court of Cook

to the Court in Cook County. The general rule is that an application to open up or set aside a judgment should be made at the earliest opportunity. (Hall v. Jones, 32 Ill. 58.)

A motion to open up a judgment is analogous to a motion to vacate a judgment obtained by default, and the rule as to laches in default is applicable. (Kane v. Turner, 195 Ill. App. 235; Sternberger v. Wright, 239 Ill. 490.) It is true that mere delay in filing a motion to vacate a judgment by confession will not always

be a bar to relief. In all cases, the Court will allow a motion to vacate a judgment by confession if it is made within a reasonable time after the entry of the judgment.

at least seven months before filing his motion in Peoria County. He was represented by counsel and chose his own forum and followed his own method of procedure. There can be no doubt that he entered in the circuit court of Peoria County a motion to vacate the judgment.

proceeding in the circuit court of Peoria County. There has been the exercise of due diligence in the filing of the motion.

and cannot be attacked collaterally. (Sheehan v. Magasin, 275 Ill. 572.) The jurisdiction of a court over a judgment which it has rendered is not lost by filing a transcript thereof in another court or county. (Ill. v. ...)

No question as to the jurisdiction of the circuit court of Peoria County to enter the judgment is raised or suggested as an objection for the attempt to set aside the judgment by a cross bill in the circuit court of Cook

County, and the method chosen was wholly at variance with well known fundamental rules fixed by long established precedent.

Where a court has jurisdiction to enter a judgment by confession, the remedy by motion to vacate it or open it up in the court where it was rendered, and in that court only, is one well known and understood by the legal profession and often employed by it. We see no sufficient excuse for the attempt of appellant to take an unchartered course rather than one which is well defined and often travelled. In making the selection he did, he invited the hazards which were incident to his choice.

In Philbrick v. Conejos County State Bank, 71 Colorado 19, 203 Pac. 678, a judgment by confession was obtained in a Colorado state court on March 3, 1921. On March 5, 1921 a suit on the judgment was begun in the Federal Court in the State of Nebraska. The defendant was served in the latter suit on March 7, 1921. Judgment was rendered against him on June, 3, 1921. On the same day he filed a motion in the Colorado state court to have the judgment set aside. That court said in the opinion; "It thus develops that there was a ninety days' delay between the date of the entry of the judgment in Colorado and defendant's motion to vacate, and that, for at least 86 days of that time he had full knowledge thereof. Not until the day of the entry of the Federal Court's order for the sale of all the attached property in Nebraska did he file his motion to vacate the Colorado judgment. In other words, defendant, when apprised of this judgment, elected first to attempt to defeat plaintiff's recovery thereon in the United States District Court, and not until a complete failure there did he decide to attack the judgment itself. * * * * * During the delay plaintiff has been put to considerable inconvenience and expended no inconsiderable sum in enforcing its rights under the judgment, all with full knowledge on the part of the defendant, and all to no purpose if the judgment be now va-

cated. We must, therefore, hold that the delay, under the circumstances, bars the relief sought. Defendant is not in apt time." The application for relief must be timely and if the applicant has been guilty of laches, relief will be denied him, as where after knowledge of the judgment the defendant permits the plaintiff to prosecute to judgment an action upon it in another state. (Freeman on Judgments, 5th Edition, Sec. 1541.)

In the counter-affidavit filed on behalf of appellee it is stated that the affiant, a brother of appellee, had a conversation with appellant on February 23, 1926; that the conversation had to do with a possibility of a settlement and satisfaction of the judgment by confession, and that appellant was at that time fully informed as to the judgment and that affiant had discussed it with appellant's attorney. These statements are denied in appellant's rebuttal affidavit. If the statements are true, then appellant had notice of the entry of the judgment more than a year previous to the time he filed his motion to set it aside. In his rebuttal affidavits, appellant admits having a conversation with appellee's brother, but says the conversation was confined principally to the payment of the note upon which the judgment was rendered.

It was incumbent upon the defendant to establish not only his diligence in filing his motion, but to show a meritorious defense. Without repeating all the statements in the several affidavits filed in his behalf, it appears from his original affidavit that when he executed the note in question there was also executed by another party, a deed with the place for the grantee's name left blank; that it was delivered to the payee of the note as collateral security for its payment, with the understanding that if the note was not paid at maturity, then the payee of the note might fill in the name of any grantee he desired; that in case he did so fill in the name of a grantee, the note was to be cancelled and surrendered to appellant; that the deed was so completed by inserting appellee's name, and was filed for record on

circumstances, here the relief sought. Defendant is not in any
time." The application for relief must be timely and at the
applicant has been guilty of laches, relief will be denied him,
as where after knowledge of the judgment the defendant does not
the plaintiff to prosecute to judgment an action upon it in
another state. (Tresman on Judgments, 5th Edition, Sec. 1341.)
In the counter-affidavit filed on behalf of appellee
it is stated that the affiant, a brother of appellee, had a
conversation with appellee on February 28, 1928; that the
conversation had to do with a possibility of a settlement and
satisfaction of the judgment by confession, and that appellee
was at that time fully informed as to the judgment and that
appellee had discussed it with appellee's attorney. These
statements are denied in appellee's rebuttal affidavit. It
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of the judgment more than a year previous to the time he filed
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original affidavit that when he executed the note in question
there was also executed by another party, a deed with the place
for the grantee's name left blank; that it was delivered to the
payee of the note as collateral security for its payment, with
the understanding that if the note was not paid at maturity,
then the payee of the note might fill in the name of any
grantee he desired; that the deed was so completed by

October 16, 1925, and the note was thereby fully paid and discharged; that on October 19, 1925, all leases to the premises described in the deed were turned over to appellee by appellant's employee at the direction of his attorney during appellant's absence from this state, and that his attorney and such employee had no knowledge of the existence of the note. In his rebuttal affidavit, he states that the conversation on February 23, 1926 related principally to the payment of the note, which in his previous affidavit, he claims was at that time fully paid and discharged. In explanation of this conversation, appellant's counsel argues that Williams did not want to lose his building and was anxious to placate the Dailys, so he could obtain a reconveyance of the property. This in effect recognizes the existence of the debt and does not comport with the theory that the note was paid and discharged.

The showing of a meritorious defense must be made in the affidavits in support of the motion, and cannot be aided in a court of review by statements and explanations of counsel dehors the record. There is no showing in any of the affidavits filed on appellant's behalf that he was negotiating or attempting to negotiate for the return of the property by the payment of his indebtedness, or that he was misled or lulled into a false sense of security by the Dailys or either of them. Other statements in his affidavit are equally vague and uncertain on the merits of the case. His affidavits are to be strictly construed and taken most strongly against him in all respects. (Stellwagen v. Schmidt 264 Ill. App. 325; Furman v. Wieszorkowski 202 id. 347; Blanks v. Mills 205 id. 542.) A motion to vacate a judgment by confession is addressed to the sound discretion of the trial court, whose decision should not be disturbed except in the case of a palpable abuse of that discretion. (Nitschke v. City of Chicago 208 Ill. 268; Blake v. State Bank of Freeport 178 id. 182; Furman v. Wieszorkowski, supra; Geist v. Kaplan 195 Ill. App. 299.)

The error assigned by appellant that improper evidence was admitted on behalf of appellee could only refer to appellee's counter-affidavit. While it is not proper for a court to consider counter-affidavits controverting the affidavit of a defendant, as to his meritorious defense, the propriety of receiving and considering counter affidavits on the question of diligence in presenting a motion to vacate a judgment is equally well settled. (Gilchrist Transportation Company v. Northern Grain Co. 204 Ill. 510; Kloeppner v. Swayne, 177 Ill. App. 384.)

The charge of usury was not presented in the trial court and cannot now be raised in this court by way of argument. The record does not contain the original note but only a copy of it, and such copy is attached to the return and cognovit. It is therefore contended that the judgment is improper on its face because no endorsement of the note is shown. The copy of the note filed is no part of the declaration. (Gage v. Lewis 68 Ill. 604; Harlowe v. Boswell, 15 id. 57; Hippach v. First National Bank, 169 id. 515.) But regardless of that fact, it is not necessary that the copy of a note attached to a declaration should show endorsements. (Francy v. True, 26 Ill. 184; Roberts v. Thomas, 28 id. 79.)

Under the circumstances in this case, we conclude that the circuit court of Peoria County properly denied appellant's motion and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
1877

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2431... 89 4

BE IT REMEMBERED, that afterwards, to-wit: On
APR 11 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the
APPELLATE COURT OF ILLINOIS,
Second District

February Term, A.D., 1928.

| | | |
|------------------------------|---|-------------------|
| J. H. KRAUSE SUPPLY COMPANY, |) | |
| a Corporation, |) | |
| |) | Appeal from |
| Appellant, |) | County Court of |
| vs. |) | Winnebago County. |
| |) | |
| ARTHUR L. HAMILTON, |) | |
| |) | |
| Appellee. |) | |

OPINION by BOGGS, J.

An action of assumpsit was instituted by appellant against appellee in the County Court of Winnebago County. The declaration consisted of the common counts with affidavit of merits. To said declaration appellee filed the general issue and a plea of set-off, accompanied by affidavit of merits. To the plea of set-off appellant filed a replication. A trial was had resulting in a verdict and judgment in favor of appellee on his set-off for \$518.65. To reverse said judgment, this appeal is prosecuted.

Prior to September 26, 1925, appellee had been engaged in the heating business in the City of Rockford. On said date he entered into a written contract with appellant in and by which appellee sold to appellant his entire business, including stock of goods, contracts on hand and good will to be paid for by appellant at the invoice price of said stock less \$500.00 which was to be applied by appellant as part payment on ten shares of the capital stock of appellant Company, which appellee was purchasing. The remainder of said purchase price was to be paid in cash within 90

In the
 APPellate COURT OF ILLINOIS
 Second District

February Term, A.D., 1920.

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|-------------------|---|------------------------------|
| Appeal from | { | J. H. KRAUSE SUPPLY COMPANY, |
| County Court of | | a Corporation, |
| Winnebago County, | | Appellant, |
| | | vs. |
| | | ARTHUR L. HAMILTON, |
| | { | Appellee. |

OPINION BY ROGERS, J.

An action of assumpsit was instituted by appellant against appellee in the County Court of Winnebago County. The declaration consisted of the common counts with affidavit of merits. To said declaration appellee filed the general issue and a plea of set-off, accompanied by affidavit of merits. To the plea of set-off appellee filed a replication. A trial was had resulting in a verdict and judgment in favor of appellee on his set-off for \$518.65. To the reverse said judgment, this appeal is prosecuted.

Prior to September 26, 1925, appellee had been engaged in the heating business in the City of Rockford. On said date he entered into a written contract with appellant in and by which appellee sold to appellant his entire business, including stock of goods, contracts on hand and good will to be paid for by appellant at the invoice price of said stock less \$500.00 which was to be applied by appellant as part payment on ten shares of the capital stock of appellant company, which appellee was purchasing. The remainder of said purchase price was to be paid in cash within 90

days of the date of the agreement. Said contract also provided that appellant was to employ appellee for a period of two years from the date of said contract at a salary of \$300.00 per month. It further provided that appellee "will not engage in or be connected with any other business during said period of time, and that he will devote his entire time and attention to said business and will endeavor, to the best of his ability, to make his employment and the business he engages in for the party of the first part a success." At the time said contract was entered into appellee had on hand two contracts, known as the Johnson and Mazzola Jobs.

On the trial of said cause appellee, over the objections of appellant, was permitted to testify that it was agreed between appellee and appellant that appellee was to retain the Johnson Job and that appellant was to furnish the materials and work necessary to finish the same without cost to appellee and that appellant was to have the Mazzola contract.

A part of the materials on the Johnson job had been delivered on the ground at the date of said contract but only a small part of the roughing-in work had been done at that time. Appellee also testified that he began said job in October and completed it about the first of November; that on December 31, 1925 he obtained from one ⁴Hyndmann, an employee in the office of appellant, a release of the Johnson job; that he said to Hyndmann, "you know that is my job; I want a release on it, so it will not conflict with my contract with the company." The Johnson job was completed and appellee collected thereon \$1425.00.

Appellee further testified that in July, 1926, he received a letter from the attorneys for appellant demanding payment by appellee of the amount he had collected on the Johnson job. He further testified that appellant deducted \$100.00 from his June salary and failed to pay his July salary and that he left the em-

ployment of appellant on August 14, 1925, having due him on his salary a total of \$550.00.

Appellee admits an item of \$31.35 claimed by appellant for material furnished appellee. The testimony on the part of appellant is to the effect that there was no agreement with reference to the Johnson and Mazzola jobs and that those jobs passed to appellant under said written contract.

Appellant also specifically denies ever having in any way considered with appellee the matter of appellee retaining the Johnson contract.

Hyndmann testified that from time to time during the fall of 1925 and the early winter of 1926 he inquired of appellee with reference to when the Johnson job would be paid for and that appellee would put him off with one excuse or another.

Helen Hay, assistant bookkeeper for appellant testified to having heard a conversation between appellee and Hyndmann with reference to the Johnson job and over-heard Hyndmann ask appellee if he got the money and appellee stated "that the loan had not gone through." She further testified that in March, April and May, 1926, she had over heard further conversations.

Allen Zerr, witness for appellant, testified to having heard a conversation between appellee and a Mr. Smith with reference to the Johnson job; that "Mr. Smith asked Mr. Hamilton why he took the \$1425.00 and Mr. Hamilton said he thought he had it coming.* * * * Mr. Hamilton said 'I will pay it back just as soon as I can; they are deducting it from my salary now.' That conversation was during the latter part of June or the first part of July, 1926."

The preponderance of the evidence is to the effect that the Johnson job was not to be retained by appellee. We are not, however, basing our decision on the oral testimony with reference to this transaction.

employment of appellant on August 14, 1936, having one him on his

salary a total of \$380.00.

Appellee admits an item of \$3.35 claimed by appellant for material furnished appellee. The testimony on the part of appellant is to the effect that there was no agreement with reference to the Johnson and Maxwell jobs and that those jobs passed to appellant under said written contract.

considered with appellee the matter of appellee retaining in Johnson contract.

Hyndmann testified that from time to time during the fall of 1935 and the early winter of 1936 he inquired of appellee with reference to when the Johnson job would be paid for and that appellee would put him off with one excuse or another.

Heleen Ray, assistant bookkeeper for appellant testified to having heard a conversation between appellee and Hyndmann with reference to the Johnson job and overheard Hyndmann ask appellee if he got the money and appellee stated "that the loan had not gone through." She further testified that in March, April and May, 1936, she had overheard further conversations.

Alton Kerr, witness for appellant, testified to having heard a conversation between appellee and a Mr. Smith with reference to the Johnson job; that Mr. Smith asked Mr. Hamilton why he took the \$1425.00 and Mr. Hamilton said he thought he had it. * * * Mr. Hamilton said "I will pay it back just as soon as I can; they are deducting it from my salary now." That conversation was during the latter part of June or the first part of

July, 1936." The preponderance of the evidence is to the effect that the Johnson job was not to be retained by appellee. We are not, however, basing our decision on the oral testimony with reference to this transaction.

Appellee testified that the Johnson contract and the Mazzola contract were all the contracts he had on hands at the time of entering into the written contract. Said contract provided that all contracts appellee had on hand were to pass to appellant.

Counsel for the appellee insist that the written contract was waived or abandoned by the parties, and should not have been admitted in evidence. There is no evidence in the record on which to base this contention. The intention of the parties to the written contract is to be determined from the agreement itself and not from their previous understandings and agreements. Robbs Express Company, v. Ferkel, 200 App. 471-472; Clark v. Mallory, 185 Ill. 227.

"A written contract which purports to be a complete and final statement of the entire transaction is the only evidence of its terms and conditions. All preliminary negotiations, whether oral or written, are merged in the written contract." Osgood v. Skinner, 211 Ill. 229-238; Telluride Power Co., v. Crane Co., 208 Ill. 218-227; Davis v. Fidelity Ins. Co., 208 Ill. 375-382; Zalapi v. Holcomb Manufacturing Co., 241 App. 102-106.

It is insisted by appellee that the Court should take into consideration the facts and circumstances surrounding the parties at the time the contract was entered into.

"The rule that in construing a contract it is proper for the Court to take into consideration the surrounding circumstances does not give to either party the right to establish, by oral evidence, a different contract from that expressed in the written agreement. All conversations and parol agreements between the parties prior to the making of their written agreement are merged in the writing and cannot be proved for the purpose of changing the contract or showing an intention different from that expressed." Armstrong Paint Co., v. Can Co., 301 Ill. 102-106. The Court rightfully

Appellee testified that the Johnson contract and the
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of entering into the written contract. Said contract provided for
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to base this contention. The intention of the parties to the
written contract is to be determined from the agreement itself and
not from their previous understandings and agreements. Johnson
Company, v. Ferkel, 200 App. 471-472; Clark v. Wilford, 182

111. 247.
"A written contract which purports to be a complete and
final statement of the entire transaction is the only evidence of
its terms and conditions. All preliminary negotiations, whether
oral or written, are merged in the written contract." Good v.
Shinner, 211 Ill. 230-232; Tellmire Power Co. v. Crane Co., 200
Ill. 212-214; Ill. Ins. Co. v. Ill. Ins. Co., 208 Ill. 375-382;
Ill. Ins. Co. v. Ill. Ins. Co., 241 App. 102-106.
It is insisted by appellee that the Court should take into
consideration the facts and circumstances surrounding the parties
at the time the contract was made.
Court to take into consideration the surrounding circumstances does
not give to either party the right to establish, by oral evidence,
a contract different from that expressed in the written agreement.
All conversations and oral agreements between the parties prior
to the making of their written agreement are merged in the writing
and cannot be proved for the purpose of changing the contract or
adding an implied condition. Ill. Ins. Co. v. Ill. Ins. Co., 241 App. 102-106.

admitted said contract in evidence.

It is next insisted that the Court erred in not giving appellant's refused instructions one, two and three. These instructions were based on the written contract in question and should have been given.

It is next insisted that the Court erred in giving appellee's instruction No. three. This instruction undertakes to set out in detail the contention of the parties with reference to their respective claims and concludes: "And it is for the jury to determine from a preponderance of the evidence who is right." The written contract determines the rights of the parties and its construction was for the Court.

"It is reversible error for the Court to give instructions which require the jury to find and determine legal propositions. Neither should an instruction be submitted to the jury for them to determine questions of mixed law and fact." People v. Mayor of Alton, 193 Ill. 309-311; Lence v. Insurance Company, 147 App. 259-262; Peoria Traction Co. v. O'Connor, 149 App. 598-603.

"Where a contract is in writing its construction is a matter of law for the Court, and the Court should construe the contract and advise the jury of its meaning." Rosenbaum Brothers v. Devine, 271 Ill. 354-357; Carstens Packing Company v. Sterne Co., 286 Ill. 355-357; Hancock v. Knights of Security, 303 Ill. 66-70; Cutler v. Gardiner Co., 225 App. 497-499. The Court erred in giving appellee's instruction No. three.

Appellee strenuously insists that we should not consider this case on the merits for the reason that appellant did not sufficiently abstract the pleadings.

Appellant did not abstract the declaration, but abstracted the plea of set-off and the replication. The declaration consisted

admitted and correct in substance.

It is said that the Court would be well advised to
appealant's position, instructions one, two and three. These in-
structions were based on the written contract in question and
should have been given.

It is next insisted that the Court erred in giving
appealant's instruction No. three. This instruction, according to
set out in detail the contents of the written contract and
their respective claims and defenses: "And it is the duty of
the jury to determine from a preponderance of the evidence who is right." The
written contract between the parties and its
construction was for the Court.

"It is reversible error for the Court to give instructions
which require the jury to find and determine legal propositions.
Neither shall an instruction be given to the jury which
is to determine questions of mixed law and fact." People v. Jones
of Illinois, 195 Ill. 291-311; Jones v. Insurance Company, 195 Ill.
283-284; People's Trust Co. v. O'Connor, 149 App. 598-603.

"Where a contract is in writing its construction is a
question of law for the Court, and the Court should give
instructions and advise the jury of its meaning." Rosenbaum Brothers
v. Davis, 251 Ill. 384-387; Gardner Packing Company v. Stearns, 251
Ill. 385-387; Hancock v. Knights of Security, 308 Ill. 68-70;
Miller v. Miller, 327 Ill. 627-628. The Court erred in
giving appealant's instruction No. three.

Appealant strenuously insists that we should not consider
this case on the merits for the reason that appealant did not
intentionally mislead the Court.
Appealant did not mislead the Court. The Court should
the line of action and the result. The Court should

of the common counts which are well understood. While it would have been well to have abstracted the same, the failure so to do was not important. Numerous cases were cited by appellee in support of his contention that the abstract was not sufficient.

An examination of these cases will disclose that they were entirely different from this case. In each of the cases cited it was important that the Court have before it a sufficient abstract of the declaration in order to determine the issues. That was not necessary in this case and we would not be warranted in refusing to consider the case on account of the alleged insufficiency of the abstract.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and Remanded.

of the same nature and extent as that which has been
has been seen only in some instances, and the latter is
and the former. The same is true of the latter in the
part of the country, and the former is the same.
In addition to the above, the latter is the same
of the former, and the latter is the same. The latter is
very important, and the former is the same. The latter is
of the former, and the latter is the same. The latter is
necessarily in the same, and the former is the same.
to assist in the same, and the former is the same.
the latter.

For the purpose of the same, and the former is the same.
every will be the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

The latter is the same, and the former is the same.
The latter is the same, and the former is the same.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

also in...

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of February, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2431A. 629

BE IT REMEMBERED, that afterwards, to-wit: On

APR 1 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the
APPELLATE COURT OF ILLINOIS,
Second District.

February Term, A.D., 1928.

| | | |
|----------------------------|---|------------------|
| G. H. LEFLER, |) | |
| Appellant, |) | Appeal from the |
| vs. |) | Circuit Court of |
| |) | Peoria County, |
| BOARD OF SCHOOL INSPECTORS |) | Illinois. |
| OF THE CITY OF PEORIA AND |) | |
| SCHOOL DISTRICT NO. 150, |) | |
| Peoria County, Illinois, |) | |
| Appellee, |) | |

OPINION by BOOGS, J.

An action in assumpsit was instituted by appellant against appellee to recover the balance alleged to be owing on a contract between appellee and appellant for the school year of 1920-1921, and to recover on a contract alleged to have been entered into between appellee and appellant for the school year of 1921-1922. A trial was had, resulting in a verdict and judgment against appellant in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

This case was before this court on a former appeal, and will be found reported in 241 App. 289. On the former trial, the jury returned a verdict in favor of appellant for \$167.74, from which judgment appellant prosecuted an appeal to this court. The cause was reversed on the ground that the court erred in its rulings on the evidence and in directing a verdict for appellee on

In the
 APPELLATE COURT OF ILLINOIS,
 Second District.

February Term, A.D., 1928.

| | |
|------------|---|
| Appellant, | O. H. LUTHER, |
| vs. | BOARD OF SCHOOL INSPECTORS
OF THE CITY OF PEORIA AND
SCHOOL DISTRICT NO. 150,
Peoria County, Illinois, |
| Appellee, | |

Appeal from the
 Circuit Court of
 Peoria County,
 Illinois.

OPINION BY BOGGS, J.

An action in assumpsit was instituted by appellant against appellee to recover the balance alleged to be owing on a contract between appellee and appellant for the school year of 1920-1921, and to recover on a contract alleged to have been entered into between appellee and appellant for the school year of 1921-1922. A trial was had, resulting in a verdict and judgment against appellant in bar of action and for costs. To reverse said judgment, this appeal is prosecuted.

This case was before this court on a former appeal, and will be found reported in 241 App. 222. On the former trial, the jury returned a verdict in favor of appellant for \$167.74, from which judgment appellant prosecuted an appeal to this court. The course was reversed on the ground that the court erred in its findings on the evidence and in directing a verdict for appellee on

the third and fourth additional counts.

The pleadings, practically all of the documentary evidence and the motion for a new trial were not abstracted. We would, therefore, be warranted in affirming the judgment on that ground alone. Gibler v. City of Mattoon, 167 Ill. 18-22; Barber v. Mellish-Hayward Co., 209 App. 299; Dunlap v. B. of R. T., 214 App. 376-378; Deterding v. C. I. P. S. Co., 223 App. 374-375-376. We have, however, deemed best to consider the case on the merits.

The record discloses that, on the recommendation of appellee's committee for the employment of teachers, appellant, among others, was to be employed for the school year 1921-1922; that a form of contract for such employment, fully filled out as to terms, etc., was sent to appellant through the office of appellee's secretary. Said form bore the printed name of appellee, with a blank line, with the word "Secy." printed at the end or under the same, and with another line for the teacher to sign. Below the lines for signatures was printed: "These forms are in duplicate. One copy is to be signed and kept by you. You are to sign and return the other copy to the Secretary of the Board within ten days of the date of the proffer of this contract, which proffer shall date from the date under the signature of the secretary of the Board; otherwise, your position will be declared vacant."

It is conceded by counsel for appellant that the alleged contract of employment was not to be performed within one year, and to be valid and binding must have been in writing, signed by the party to be charged. However, it is insisted that said instrument delivered to appellant in duplicate, with the terms and conditions of the proposed employment, with the name of appellee printed thereon, when signed by appellant and returned to the office of appellee board, as testified to by appellant, was a sufficient signing to

...the ...

...the motion for a new trial were not sustained. We would

...the ...

...Gibber v. City of Madison, 167 Ill. 18-22; Barber v. ...

...209 App. 239; Dunlap v. B. of R. T., 214 App. 370-378;

...I. B. Co., 223 App. 374-375-376; We have, how-

...ever, deemed best to consider the case on the merits.

...The record discloses that, on the recommendation of appellee's

committee for the employment of teachers, appellant, among others,

...for the school year 1921-1922; that a form of

...fully filled out as to terms, etc.,

...This form bore the printed name of appellee, with a blank line

...the word "X" printed at the end or under the name, and

...Below the line for the teacher to sign. Below the line for

...These forms are in duplicate. One copy

...to be signed and kept by you. You are to sign and return the

...the Secretary of the Board within ten days of the

...of the greater of this contract, which proper shall

...from the date under the signature of the Secretary of the Board;

...as well, your position will be declared vacant."

...It is conceded by counsel for appellant that the alleged

...of employment was not to be performed within one year, and

...and binding must have been in writing, signed by the

...However, it is insisted that said employment

...to appellant in duplicate, with the terms and conditions

...proposed employment, with the name of appellee printed there-

...signed by appellant and returned to the office of appellee

...attested to by appellant, was a sufficient signing to

make a valid and binding contract under the statute of frauds, without said contract having been signed by the secretary or assistant secretary of said board. It is also insisted by counsel for appellant that appellee board having approved and ratified said recommendation that appellant be employed, setting forth terms, etc., its record thereof, signed by its secretary was a sufficient memorandum signed by the party to be charged, to make a valid and binding contract.

This same argument was made by appellant on the former hearing of said cause, and the law as laid down on that hearing, so far as applicable in this case, is res judicata. Lusk v. City of Chicago, 211 Ill. 183-188; People v. Waite, 243 Ill. 156-160; Village of Oak Park v. Swigart, 266 Ill. 60-61; Mariner v. Gilchrist, 280 Ill. 544-549; People v. Young, 309 Ill. 27-30; City of Chicago v. Collin, 316 Ill. 104-113.

On page 232 of the opinion on the former hearing, we said:

"The contract was not to be performed within a year and for that reason it was necessary that the contract, or some memoranda or note thereof, should be in writing and signed by the party to be charged, or by some other person lawfully authorized. * * *

"It is evident that the election of appellant to this position was not intended by appellees to constitute a contract between the parties, and therefore the facts alleged in the additional count to have been in writing were not sufficient to take the case out of the statute of frauds. On the other hand, it is apparent that it was the intention of the parties that a contract in writing should be entered into between the parties after the election of appellant. This is apparent from the fact that certain conditions are contained in the contract as sent to appellant relative to his membership in the Men's Federation.

"If the records of the school board are not sufficient to

make a valid and binding contract under the statute of frauds.

Without said contract having been signed by the Secretary or

assistant secretary of said board. It is also stated by the

for appellant, that the contract was not signed by the Secretary or

assistant secretary of said board, and that the contract was not

signed by the Secretary or assistant secretary of said board.

to make a valid and binding contract.

This same argument was made by appellant on the former

hearing of said cause, and the law as laid down on that hearing,

so far as applicable in this case, is res judicata. Irish v. Irish

of Chicago, 211 Ill. 183-188; People v. Wells, 243 Ill. 186-190;

People v. Park v. Park, 263 Ill. 60-61; Warner v.

Ill., 260 Ill. 244-249; People v. Young, 308 Ill. 27-30; City

Ill., 316 Ill. 104-113.

On page 282 of the opinion on the former hearing, we said:

"The contract was not to be performed within a year and

for that reason it was necessary that the contract, or some memorandum

and or note thereof, should be in writing and signed by the party

to be enforced."

"If it is not in writing, it is not enforceable."

position was not intended by appellant to constitute a contract.

the facts alleged in the affidavit.

ional court to have been in writing were not sufficient to take

the case out of the statute of frauds. On the other hand, it is

agreed that it is not in writing.

in writing should be entered into between the parties after that

election of appellant. This is apparent from the fact that certain

condition of the contract was that it should be in writing.

the contract was not in writing.

the contract was not in writing.

constitute a writing under the statute of frauds, the next question is whether there was evidence which shows that the contract sent to appellant was in fact signed by the secretary, thus making a valid contract between the parties."

It was determined on the former hearing that the records of appellee board did not amount to a memorandum signed by the party to be charged; unless the contract in question was signed by the secretary of appellee board, it would not be a binding contract on appellee so as to take the case out of the statute of frauds.

On the issue as to whether or not the secretary or assistant secretary of appellee board signed the contracts in question, the evidence is confined to the testimony of appellant, such secretary and assistant secretary. Appellant called as a witness Frances M. Ulricson, who testified that she had been employed by said board since 1913, and had held the office of assistant secretary intermittently since said time; that she was not in charge of the records of the board, but helped to take care of them and had done so since 1917; that a subpoena duces tecum had been served by appellant to produce for evidence the alleged contract in question; that a search had been made by her for it, both before and after the serving of said subpoena duces tecum; that she "searched in the vaults of the board, and wherever it might be found, but have found no trace of it. Made one search about two days ago, and one about two weeks ago."

Appellant testified in reference thereto: "I received a communication from the defendant about the 20th or 21st of May, 1921, consisting of a printed and typed form of contract for my employment during the school year 1921-1922, the same in substance as plaintiff's exhibit 1-4, with the blanks filled in, but not the

and had held the office of assistant secre-

THE UNIVERSITY OF CHICAGO PRESS

same in form. The instrument was in duplicate. It held them until about the 29th or 30th day of May, when I returned them, duly signed by me, to the office of the defendant, * * * Never saw either of the forms of contract after I delivered them to the defendant." On cross examination he testified: "Do not know whether the blank prepared for the secretary was ever filled out. Do not recall what person received the contract from me; I took it to the back office of the defendant. Do not know whether that is the secretary's office. * * * I think the secretary's office is the adjoining room. I either laid the contract on the counter or delivered it into some person's hands there at the counter. *** To my best recollection, I delivered the contract to Miss Ulricson, but cannot testify positively as to the person who received it."

The witness Frances M. Ulricson testified on behalf of appellee that she "could not remember whether the plaintiff returned the contract to me in person; to the best of my knowledge I did not see the contracts since they were mailed from the board. I did not sign them." This witness further testified: "The rules are that contracts should be returned to the secretary's office. The mail is received at the secretary's office."

On behalf of appellee, C. A. Dille, it's secretary, testified that he was the secretary of said board in 1921; that he "did not see the duplicate contracts covering the year 1921-1922 after they were sent out by the board of school inspectors to C. H. Lefler, and did not sign them."

On the issue, therefore, as to whether or not the contract in question was signed by appellee's secretary or assistant secretary, the verdict of the jury is sustained by a clear preponderance of the evidence.

No complaint is made as to the rulings of the court on the evidence. The only oral testimony offered by appellee consisted of

his own testimony and that of the witness Frances Ulricson. In addition to the testimony set forth, appellee also offered testimony with reference to the conduct of appellant in connection with the Men's Teachers Federation, of which he was the acting secretary.

Appellant testified as a witness for appellee that he acquiesced in the passing of the resolution which condemned certain of the policies of appellee's board. On account of his conduct in this connection, he was discharged by appellee's board twelve days before the end of the school year of 1920-1921.

It is next contended by counsel for appellant that the court erred in refusing seven of the instructions offered by appellant. The first and second refused instructions, so far as they state correct principles of law, were covered by appellant's eighth instruction. There was no error in refusing appellant's third, fourth, fifth and sixth instructions, for the reason that said instructions would have submitted to the jury questions of law that had been determined on the former hearing adversely to the theory set forth in said instructions. The court did not err in refusing appellant's seventh instruction, for the reason that as to all questions tending to impeach appellant that were objected to the objection was sustained.

It is also insisted that the court erred in giving the six instructions given on behalf of appellee. Under the decision of this court on the former appeal, the giving of appellee's first instruction was not error. It is contended that the second instruction was erroneous, for the reason that it required positive proof of the signing of the contract in question by the secretary of appellee in order to make it a binding contract. We held on the former appeal that, in order to make it a binding contract, it was necessary that the secretary or assistant secretary of appellee's board sign the same. The instruction submitted to the

...the passing of the resolution which condemned ...
...of appeal board. On account of ...
...he was discharged by appeal board twelve days before the ...
...of the school year of 1930-1931.

The first and second ... instructions ...
...correct principles of law were ... by appellant ...
...instruction. There was no error in ... appellant's ...

...that had been ... on the former ...
...set forth in said instructions. The court did not ...
...appellant's seventh instruction, for the reason that ...
...instructions tending to impress appellant that were object- ...
...the objection was sustained.

It is also insisted that the court erred in giving the six ...
...on given on behalf of appellant. Under the decision of ...
...on the former appeal, the ruling of appellant's first ...
...was not error. It is contended that the second inst- ...
...of the court in question by the court's ...
...in order to make it a binding contract. We held on ...

jury the question whether or not it had been so signed. The giving of the instruction therefore was not error. As to the third, fourth and fifth instructions given on behalf of appellee, counsel for appellant insist that the giving of the same was erroneous, because they are incomplete. By incomplete, we take it counsel mean that they are abstract in form. The third and fourth instructions are abstract in form; however, they state correct principles of law and, taken in connection with the other instructions given, the court did not err in giving the same.

Appellee's fifth instruction is as follows:

"The Court instructs the jury that if the plaintiff, without excuse, conducted himself toward the board in such a way as to interfere with the harmonious transaction of business, and to render it injurious to the interests of the public schools to retain him in its service, then the defendant had the right to discharge him." This instruction is not properly guarded, but we are not prepared to say that the giving of the same was reversible error, in view of the evidence in the record.

It is also insisted by counsel for appellant that the court erred in its rulings on objections made by appellant to the closing argument of counsel for appellee. Certain of the language objected to is not set forth in the record, nor in the abstract. As to the language objected to which is set forth, we are of the opinion and hold that the rulings of the court thereon were not erroneous.

Lastly, it is insisted that the court erred in not sending to the jury a certain exhibit offered in evidence by appellee. Without going into a discussion of this assignment of error, we are of the opinion and hold that the action of the court is not rightfully subject to the criticism made, especially in view of

the fact that the exhibit was not offered by appellant.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

77
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

246 I.A. 670

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7745
~~7445~~

Agenda 1.

OCTOBER TERM, 1927.

| | | |
|-------------------------|---|--------------------------------|
| THE PEOPLE OF THE STATE | : | |
| OF ILLINOIS, | : | |
| | : | |
| Defendants in Error, | : | |
| vs. | : | WRIT OF HABEAS CORPUS TO THE |
| | : | WINNEBAGO COUNTY CIRCUIT COURT |
| ALFONSO CACI, | : | |
| | : | |
| Plaintiff in Error. | : | |

Jett, P. J.

The grand jury of the County of Winnebago returned an indictment against Alfonso Caci, plaintiff in error, in which he was charged with a violation of the Illinois Prohibition Act. The indictment consists of three counts. The first charges the plaintiff in error with the manufacture of intoxicating liquor; the second, that the plaintiff in error, owned, operated and maintained a still, designed for the illegal manufacture of intoxicating liquor; the third, that the plaintiff in error possessed intoxicating liquor for the purpose of sale, and all without permit from the Attorney General.

A trial was had before the court without the intervention of a jury. The court found the plaintiff in error guilty as charged in all three of the counts of the indictment. The plaintiff in error was fined \$1,000 on the first count, \$200. under the second count and \$800. under the third count. It was further adjudged that the defendant pay the costs of prosecution, and that he stand committed until said fine on each of the said three counts and costs were fully paid.

A number of reasons are assigned by the plaintiff in error for a reversal of the judgment. It is insisted that the court should have sustained a motion to quash the complaint and search

OCTOBER TERM, 1937.

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendants in Error,

vs.

ALFONSO GAGI,

Plaintiff in Error.

Left, P. 1.

The Grand Jury of the County of Winnebago returned an indictment against Alfonso Gagi, plaintiff in error, in which he was charged with a violation of the Illinois Prohibition Act. The indictment consists of three counts. The first charges the plaintiff in error with the manufacture of intoxicating liquor; the second, that the plaintiff in error, owned, operated and maintained a still, designed for the illegal manufacture of intoxicating liquor; the third, that the plaintiff in error possessed intoxicating liquor for the purpose of sale, and all without permit from the Attorney General.

A trial was had before the court without the intervention of a jury. The court found the plaintiff in error guilty as charged in all three counts of the indictment. The plaintiff in error was fined \$1,000 on the first count, \$200 on the second count and \$800 on the third count. It was further adjudged that the defendant pay the costs of prosecution, and that he stand committed until the expiration of the said three counts and costs were

persons are assigned by the plaintiff in error for a reversal of the judgment. It is insisted that the court have sustained a motion to quash the complaint and search

warrant and to impound the evidence for the following reasons:

(1) That the search was unlawful because an unreasonable length of time elapsed between the issuance of the warrant and the search and service of it on the plaintiff in error.

(2) Because the facts set out in the complaint are insufficient grounds on which to issue a search warrant.

(3) The complaint, for search warrant did not contain an allegation that Alfonso Caci, or any other person, possessed intoxicating liquor, manufactured the same, or possessed a still or other articles intended for the manufacture of liquor, or operated a still on the premises named in said complaint.

The argument is especially directed to the length of time which elapsed from the issuing of the search warrant until the service of the same on the plaintiff in error. In other words, it is the contention of the plaintiff in error that the search was unlawful because an unreasonable length of time elapsed between the issuance and the service of the warrant on the plaintiff in error.

The complaint, as a basis for the search warrant, was made before a Justice of the Peace, on the 23rd day of September, 1926. The search warrant was issued on the same day. The record discloses that the search warrant was not served on the plaintiff in error until the 28th day of September 1926, being at least five days from the time it was issued.

The record discloses that the dwelling house and premises searched are located at 706 Montague Street in the City of Rockford, Illinois. There is nothing in the record to explain the delay on the part of the sheriff in serving the warrant. Number 706 Montague Street, Rockford, is within the City limits of the county seat of Winnebago County.

In support of his contention in this respect plaintiff in error relies upon the rule announced in the case of The People

warrant and to improve the evidence for the following reasons:

(1) That the search was unlawful because an unreasonable length of time elapsed between the issuance of the warrant and the

search and service of it on the plaintiff in error.

(2) Because the facts set out in the complaint are

materially different from those on which a search warrant

(3) The complaint, for search warrant did not contain an

allegation that Alfonso Gail, or any other person, possessed

any thing at home, manufactured the same, or possessed a still or

any other thing, or any other thing, or operated

still on the premises named in said complaint.

The argument is especially directed to the length of time

elapsed from the issuance of the search warrant until the

search was made on the same on the plaintiff in error. In other words, it is

the contention of the plaintiff in error that the search was unlawful

because an unreasonable length of time elapsed between the issuance

of the warrant and the service of the warrant on the plaintiff in error.

The complaint, as a basis for the search warrant, was made

on the basis of the facts set out in the complaint.

The search warrant was issued on the same day. The record discloses

that the search warrant was not served on the plaintiff in error

until the 12th day of January, 1927, which is more than

two weeks after the issuance of the warrant.

The record discloses that the search warrant was issued

and located at 706 Montague Street in the city of Chicago.

It is nothing in the record to explain the delay on

the part of the sheriff in serving the warrant. Under 706 Montague

Street, Chicago, Illinois, on the 12th day of January, 1927.

Witness my hand and seal.

In witness whereof, I have hereunto set my hand and seal

at the City of Chicago, Illinois, this 12th day of January, 1927.

vs Wiederman, 324 Ill. 66, in which the court said:

When in any process, or in the law authorizing it, no time within which the process must be executed and returned is named, the process must be executed within a reasonable time from its issuance and becomes functus officio thereafter. If this is not true the time within which such a process may be executed is unlimited and it never becomes functus officio, no matter how long its execution is delayed. Ministerial officers assuming to execute judicial process upon the person or property of a citizen must execute it promptly and precisely. This is especially true of a search warrant, which is a powerful police weapon. The qualities which make it efficient as an aid to enforcing the law make it dangerous when abused. The danger of its use as an instrument of oppression fixed itself so firmly upon the minds of the founders of this government that they erected constitutional barriers against it. Section 6 of article 2 of our constitution provides that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by an affidavit, particularly describing the place to be searched, and the persons or things to be seized.' The nature of the search warrant indicates that it shall, when issued, be promptly executed. There is nothing in the law concerning warrants which indicates that a warrant may be held by an officer as a weapon, to be used at his discretion. The legislature has recognized this necessity of the immediate execution of the warrant in prosecutions for illegal possession of intoxicating liquors and has specifically commanded it. Section 30 of the Prohibition act provides, that if the judge before whom complaint is made is satisfied that there is reasonable cause for believing that the person complained against is in illegal possession of intoxicating liquor, he shall issue a search warrant to the proper officer commanding him to forthwith enter the place described in the warrant, and, if he find and seize property described in the warrant, to forthwith bring the property seized and the person arrested before some judge having cognizance of the case.

The nature of the process and the command of the statute require that a search warrant must be executed with reasonable promptness and not at the unlimited discretion of the officer. The time the officer may take will necessarily vary with the circumstances. The distance to the place to be searched, the condition of the roads, the facilities for travel, the demands upon the time of the officer, and other circumstances, may make a service delayed for several hours practically immediate and hence executed within a reasonable time. In this case no reason is given for the unusual delay. Plaintiff in error lived in Saline county on Route 13 of the system of State highways, a short distance west of Harrisburg, the county seat, and nothing appears indicating that the warrant could not have been executed on the day it was delivered to the sheriff. No reason whatever is shown for the delay of a

week. Promptness in the service of the writ is not only necessary for the preservation of the liberty of the citizen but also for the efficient administration of the law. Every hour's delay, whether caused by the officer's inefficiency or some other factor, endangers the success of the prosecution. If an officer may without excuse hold a search warrant for six days he may hold it for six weeks or six months. The search warrant in this case was either valid when it was executed by the sheriff or it was void. There could be no middle ground. The warrant not having been served within a reasonable time after it was issued became functus officio and the search made under it was one made without a warrant. State v. Guthrie, 90 Me. 448, 38 Atl. 368; Link v. Commonwealth, 199 Ky. 778, 251 S.W. 1016; Cornelius on Search and Seizure, sec. 141."

In view of the fact that there is nothing in the record explaining the delay in the execution of the warrant, and of the law as announced in the Niederman case, it was error to refuse to quash the complaint and search warrant and to impound the evidence. It was error to permit the State to introduce in evidence the intoxicating liquor illegally seized. People vs Castree, 311 Ill. 392.

We conclude, therefore, that the judgment of the Circuit Court of Winnebago County should be reversed and the cause remanded, which is accordingly done.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

1951
240 L.A. 000²
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

W. 192 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

on the first day of November, 1921, a lease was entered into by the parties to this proceeding, the first clause of which reads as follows: "This Indenture made this first day of November, 1921 between W. Twyman, of the first part and the Bowker-Smith Company, of the second part: Witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by said party of the second part, their heirs, executors, administrators, or successors and assigns, has demised and leased to said party of the first part, all those premises situated, lying and being in the city of Monmouth, in the County of Warren and State of Illinois, known and described as follows, to-wit: The building sixty feet long and forty feet wide located on the corner of the alley of Seventh Avenue and Fifth Street between Fourth and Fifth Streets." The lease provided that the party of the second part should hold the same from the first day of November, 1921, until the first day of November, 1926, to be occupied for the purpose of an ice storehouse and no other; that, in consideration of the leasing of the premises the second party covenanted and agreed with the party of the first part to pay the said party of the first part, as rent for said premises, the sum of \$25.00 per month, payable on or before the first day of each month in advance, at the office of the People National Bank, during the continuance of the lease and so long as the party of the second part, or anyone under them, should occupy said premises, or any part thereof. It was further covenanted that the party of the second part should pay and discharge all costs and attorneys fees and expenses that might arise from enforcing the covenants of this indenture by the party of the first part. There are many other provisions in the lease, but it is unnecessary to set them out for the purposes of this opinion.

There was no difficulty about the compliance with the terms of the lease for some considerable length of time. In April, 1923, however, the defendants failed to pay the installment falling

due on that month, and they failed to meet the required installments for the next succeeding six months. On November 3, 1923, the defendants, being then in possession of the premises described in the lease, the plaintiff served upon them a notice that there was then due the sum of \$175.00, being rent then due for the premises described in the lease. In the same notice, a demand for the rent was made on the defendants and they were notified that unless payment thereof was made on or before the 8th day of November, 1923, the lease of said premises would be terminated. The notice was signed by the plaintiff.

On the 12th day of November, 1923, a complaint in writing was filed by the plaintiff with a justice of the peace, instituting a forcible entry and detainer proceeding against the defendants and summons was issued and served upon them. The defendants then paid all of the rent due, and all costs, expenses and attorneys fees and tendered the keys to the premises to the plaintiff. This suit in assumpsit was then instituted by the plaintiff.

The record discloses that the original declaration in this proceeding consisted of three special counts declaring upon the written lease, together with the common counts. To this declaration defendants filed a special plea alleging the termination of the lease by the action of the plaintiff in serving a demand for rent due and a five days notice of his intention to terminate the lease for non-payment of rent, and the subsequent institution of an action of forcible detainer and of service of summons in that action on the defendants, together with the payment of the rent by the defendants.

A demurrer was interposed to the special plea which was by the court overruled. The plaintiff then amended the first, second and third counts, being the special counts originally filed, which were on demurrer held to be bad. The plaintiff then filed, by leave of the court, what is known in this record

...the sum of \$15.00
...being then in
...the sum of \$15.00
...omises described in the lease. In the same notice, a jo-
...the rent was made on the defendants and they were
...that unless payment the rent was made on or before the
...the lease of said premises would be
...The notice was signed by the plaintiff.
...the 12th day of November, 1938, a complaint in writ-
...was filed by the plaintiff with a ju. of the peace, in-
...proceeding against the
...summons was issued and served upon them. The de-
...then paid all of the rent due, and all costs, expenses
...written lease, together with the common counts. To this
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...action of the lease by the action of the plaintiff in serving a
...intention to
...lease for non-payment of rent, and the subsequent
...action of
...summons in that action on the defendants, together with the
...for was interposed to the special plea which was
...the court overruled. The plaintiff then amended the first
...and a 2nd count, being the special counts originally
...are on set

as supplemental counts 5, 6, 7 and 8, which counts in verbiage are slightly different from that in the amended declaration. These supplemental counts 5, 6, 7 and 8 are the ones now before the court. The first three are special counts and the last is a consolidated common count.

By the 5th supplemental count it is charged that the plaintiff was in the ice business, owning the property which is the subject of the lease, and other equipment, and on November 1st, 1921, he sold and delivered to the defendants, who then and there verbally agreed to pay and take of the plaintiff the said business. It is then charged that the defendants agreed to pay \$1500.00 in installments of \$25.00 on the first of each month for five years, first installment to be paid November 1st, 1921; the said Plaintiff further agreed as part of the consideration by him to be performed, not to engage in the retail ice business in the City of Monmouth or vicinity thereof for the term of five years from the 1st day of November, 1921. The parties then and there on the date aforesaid, to-wit, the 1st day of November, 1921, stipulated in writing certain matters concerning said contract of sale and purchase properly to be put in writing according to the statutes in such cases made and provided as will more fully appear by a copy of the said memorandum attached hereto and marked Exhibit A., signed by the said Plaintiff as an individual and by the said Bowker-Smith Company, the Defendants herein, and upon the execution of said memorandum the said Plaintiff delivered to the said Defendants the names of more than three hundred patrons of said ice business then in his possession, and surrendered to the said Defendants the use of said building hereinbefore mentioned, then being used in connection with said ice business and referred to in Exhibit A, and the sawdust then in said building, all of great value, to-wit: the value of \$1500.00 and from thence hitherto the said Plaintiff has not engaged in the retail ice business in the City of Monmouth or the vicinity thereof,

and has in all manner properly performed his part of said agreement by him to be performed. The said Defendants upon the date aforesaid, to-wit, the first day of November, 1921 immediately entered upon the enjoyment of said premises known as the Ice House and building described in Exhibit A. and obtained from the said Plaintiff the list of patrons and users of ice delivered to them by the said Plaintiff together with all the chattel property by said agreement to be delivered by said Plaintiff to the said Defendants, and thereupon the said Defendants began serving said patrons with ice, and also delivered to the Plaintiff a quantity of ice for his personal use for a short time thereafter. The said Defendants continued in the conduct of said ice business and to deliver quantities of ice to the Plaintiff for his personal use at his residence and store, and to pay the installments of the purchase price of \$25.00 a month as they had theretofore undertaken until the 1st day of November, 1923.

The Plaintiff then alleges that the defendants have, since the execution of the contract, retained all of the benefits under said contract but have breached their contract and refused to pay the installments of the purchase price or any part thereof from the first day of November, 1923, to the second day of September, 1924, and have refused to deliver to the Plaintiff at his residence and store the ice which he required for his personal use between said dates.

The count then relates how because of the failure of the defendants to deliver the ice as required by the contract the plaintiff has been compelled to purchase ice in the open market for his personal use at his residence and store between these dates, the reasonable value of which was in the sum of \$140.00 which the defendants have also refused to pay, or any part thereof, the foregoing breaches resulting in damage to the plaintiff in the sum of \$1000.00.

The said exhibit is the instrument heretofore referred to as the lease.

The 6th supplemental count is identical with the fifth except that it alleges "it was then and there agreed between the plaintiff and the defendants," without stating whether the agreement was oral or written, and except that the count states "to evidence that portion of the transaction required by law to be in writing in order to be binding upon the parties, a memorandum was signed by the plaintiff and the defendants," and that copy of memorandum is attached as Exhibit "A".

The 7th supplemental count is very similar to the sixth count.

To the declaration composed of counts, 5, 6, 7 and 8 the defendants filed pleas setting up service of a five day notice of rent due, demanding payment by a given time, and notice that upon non payment, the lease would be terminated, together with plaintiff's affirmative act to secure possession by filing with the Justice of the Peace a complaint in forcible entry and detainer, and averring issuance and service of summons.

The pleas conclude with the averment that the defendants afterwards and during the month of November, 1923, surrendered to the plaintiff the possession of the premises and that all moneys due from the defendants to be plaintiff under the lease for rent, costs, expenses and attorneys fees in enforcing the terms of said lease had been paid.

To the pleas of the defendants the plaintiff filed a general and special demurrer and the same was overruled. The plaintiff then elected to stand by his demurrer which had thus been overruled and judgment was rendered against him for costs of suit.

The question now is, did the court err in overruling the demurrer.

6th Supplemental Report is filed
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of the premises and that all
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It is contended by the plaintiff that the pleas neither deny nor confess and avoid the cause of action stated by the plaintiff and that the pleas do not conform to the declaration and do not answer the same.

The rule is that a plea in avoidance must give color to the plaintiff, that is, must give him credit for having an apparent or prima facie right of action, independently of the matter disclosed in the plea.

Vol. 1 Chitty 556 (6th Edition)

Wiley and Drake vs. National Wall Paper Co.

70 Ill. App. 543.

As a term of pleading color signifies an apparent or prima facie right: and the meaning of the rule that every pleading in confession and avoidance must give color is that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated.

Andrews-Stephens Common Law Pleading 313 (2nd Ed.)

Color is said to be either expressed or implied; implied color defined: color is said to be implied wherever the declaration charges and the plea admits an apparent or colorable right in the plaintiff. Stephens-Andrews supra. By way of discharge -- where the new matter affirmatively shows that while plaintiff once had a right of action, it has been subsequently released or extinguished. Stephens-Andrews supra. Moreover, if the real merits of the case are apparent, it is not really worth while to spend any time upon the niceties of the special pleadings. O. & A. Ry. Co. vs Suffern, 27 Ill. App. 404-401; L. N. A. & C. Ry. Co. vs Carson, Executrix, 66 Ill. App. 262-267.

In view of the rule as indicated above the pleas in question are clearly pleas in confession and avoidance; they are conformable to and answer the entire declaration. Furthermore, they are pleas in confession and avoidance by way of discharge and, necessarily,

It is contended by the plaintiff that the glass
was not broken nor contents and avoid the cause of action stated
by the plaintiff and that the glass do not conform to the de-
scribed and do not answer the same.

The rule is that a glass in avoidance must give color
to the plaintiff, that is, must give him credit for having an
interest in prima facie right of action, independently of the

VO III. App. 543.

As a term of pleading color signifies an apparent or
prima facie right and the meaning of the rule that every plead-
ing in avoidance and avoidance must give color is that it must
show an apparent right to the plaintiff and that the
defendant is not to be allowed to dispute the plaintiff's
prima facie right.

It is said to be implied wherever the declaration
states that the defendant is apparent or colorable right in
the plaintiff. Stephens-Andrews argues. By way of illustration

Stephens-Andrews argues. Moreover, it is the

Gov. vs. Stephens, 27 Ill. App. 404-401; L. N. A. & G.

Ill. App. 232-237.

in question
and clearly place in confusion and avoidance; they are colorable
as the plaintiff is not to be allowed to dispute the plaintiff's

they are pleas in bar, because all pleas in confession and avoidance are a bar. If the matters and things set up in the pleas are true, then, under the rule as we understand it, they present a complete defense to the action of the plaintiff.

It is quite apparent from what is disclosed in the record that the plaintiff has shifted his position since he originally instituted his suit. In the original declaration he called the transaction between the parties a lease. He now contends that it was a sale, and that the contract relied upon is, in effect, a verbal contract and that a memorandum was entered into with a view of complying with the statute that requires certain agreements to be reduced to writing. It must be kept in mind that the memorandum referred to in the pleadings is nothing more or less than a lease; that because of a default in the payment of the rent, as provided by the terms of the lease, notice was given to the defendants that there was due the sum of \$175.00, being rent due for the premises in question and that payment of said rent was demanded and that unless payment thereof was made on or before the 8th day of November, 1923, the lease of said premises would be terminated; that on the 12th day of November, 1923, a complaint was filed and a forcible detainer proceeding was instituted by the plaintiff against the defendants to recover the possession of the premises; that summons was issued thereon and served upon the defendants, and that they, during the said month of November, surrendered up the premises, paid all of the rent then due together with the costs and attorneys fees.

If a tenant is in arrears in payment of rent and the landlord serves a five day notice, under Section 8 of the Landlord and Tenant Act, and the tenant fails to pay, then any affirmative act by the landlord, such as beginning forcible entry and detainer or ejectment proceedings, will terminate the lease. Jeffries vs

Hart, 197 Ill. App. 514; Dickinson vs Petrie, 33 Ill. App. 155. In Jefferys vs Hart, 197 Ill. App. 514, the court on page 519, among other things said, "After a careful examination of section 8 of our Landlord and Tenant Act, supra, we are impelled to adopt the reasoning set forth in Dickenson vs Petrie, supra, and to hold that under said section it is the privilege of the landlord, after serving the five-day notice followed by the tenant's noncompliance, to say whether or not he wishes to forfeit the lease, and to bring forcible entry and detainer proceedings or an action in ejectment. His election to do either would be an affirmative act showing that he considered the lease ended."

In conclusion all of the steps taken by the plaintiff are set out in the special pleas and in our opinion under the rule as we understand it, were such as to bar the plaintiff from maintaining his suit. We think the court properly overruled the demurrers to the special pleas. The real merits of this proceeding are apparent and as is said in C. & A. Ry. Co. vs Suffern, supra, it is not worth while to spend any time upon the niceties of the special pleadings. A motion was made by the plaintiff to strike certain portions of the record, which motion was taken with the case. In view of the conclusion we have reached in this case it is unnecessary to determine the question raised by the motion to strike portions of the record.

We conclude therefore, that the judgment of the Circuit Court of Warren County should be affirmed which is accordingly done.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
MAY 1 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

OCTOBER TERM 1927

| | | |
|--|---|------------------------|
| JOHN T. CUMMINGS, Administrator
of the Estate of Catherine
Collins, Deceased, and JAMES H.
ANDREWS, | : | |
| | : | |
| Complainants, | : | |
| VS | : | APPEAL FROM THE |
| HARRY E. BROWN and HENRY NELSON, | : | CIRCUIT COURT OF HENRY |
| Defendants. | : | COUNTY. |
| JAMES HORTON, | : | |
| Cross Complainant, | : | |
| Appellant, | : | |
| VS | : | |
| HARRY E. BROWN, HENRY NELSON and
ELLEN V. RINK, | : | |
| Cross Defendants, | : | |
| Appellees. | : | |

Jett, P. J.

On October 22nd, 1925, John T. Cummings, administrator of the estate of Catherine Collins, deceased, and James H. Andrews filed their bill of complaint in the Circuit Court of Henry County, alleging among other things that Harry E. Brown had become the owner of certain lands described in the bill by means of redeeming them as a judgment creditor from a foreclosure sale and securing a sheriff's deed thereto; that the said Brown at the time of redeeming said lands and buying them in had entered into an agreement with said Andrews that he, Brown, would pay certain sums which were, or were supposed to be, liens on said lands and should make certain payments to said Andrews, said Andrews acting in the matter in his own behalf and on behalf of the estate of Catherine Collins, and that said Brown had failed to keep his agreement. The prayer

OCTOBER TERM 1937

JOHN T. GUNNING, Administrator
of the Estate of Catherine
Collins, Deceased, and JAMES H.
ANDREWS,

Complainants,

VS

SUPREME COURT OF HENRY

COUNTY.

Defendants.

JAMES NORTON,

Gross Complainant,
Appellant,

VS

HARRY F. BROWN, HENRY NORTON and
WILLIAM V. RINK,

Gross Defendants,
Appellees.

Let it, P. 1.

On October 22nd, 1935, John T. Gunning, Administrator
of the estate of Catherine Collins, Deceased, and James H. Andrews
filed their bill of complaint in the Circuit Court of Henry County,
alleging among other things that Harry F. Brown had become the owner
of certain lands described in the bill by means of redeeming them
as a judgment creditor from a foreclosure sale and securing a
sheriff's deed thereto; that the said Brown at the time of redeem-
ing said lands and buying them in had entered into an agreement
with said Andrews that he, Brown, would pay certain sums which
were, or were supposed to be, liens on said lands and should make
certain payments to said Andrews, said Andrews acting in the matter
in his own behalf and on behalf of the estate of Catherine Collins,
and that said Brown had failed to keep his agreement. The prayer

of the bill was that said Brown be decreed to pay to the complainants the sum specified in said bill and that in default of such payment the said lands be sold.

On November 19th, 1925, James Morton, appellant herein, filed a motion for leave to become a party defendant and to file an answer and a cross bill. Leave was granted and on December 18th, 1925, he filed his answer and cross bill and in so far as they set up the interest of the cross complainant in the land involved the answer and cross bill are in identical language. In said answer and cross bill it is alleged that John S. Collins died testate on October 27th, 1906, seized in fee simple of the lands described in the bill and cross bill, and that by his will and the codicil thereto he devised said lands to his wife Catherine Collins for life, with remainder in fee to his children Anna, Frank and Joseph S. Collins, the remainder to said children being subject, however, to the payment of certain legacies to other children of said John S. Collins, which legacies were made a charge upon said lands.

The exact language of the codicil charging said legacy upon the land in question is:

"I do hereby revoke the devise in my said last will contained to my daughter, Lucy Collins, now Lucy Murphy, of a fourth interest in remainder in my real estate and I do hereby give and bequeath to my said daughter in lieu of said remainder, the sum of Twenty-five Hundred Dollars (\$2500.00) to be a charge upon said real estate and to be paid to her as soon as may be after the death of my wife, by my children, Anna, Frank and Joseph, one-third to be paid by each.

I hereby give, devise and bequeath all of my real estate subject to the use of my wife, Catherine Collins, of the same for and during her life, to my children Anna, Collins, Frank Collins and Joseph S. Collins, absolutely forever; charged, however, with the payment of legacies mentioned in said will, and the legacy of twenty-five Hundred Dollars (\$2500.00) to Lucy Murphy, mentioned in this codicil, said payment to be made as soon as may be after the death of my said wife."

The cross bill further alleges that Catherine Collins,

of the bill was that said town be decreed to pay to the com-

plaintants the sum specified in said bill and that in default of such payment the said lands be sold.

On November 19th, 1935, James Norton, appellant herein, filed a motion for leave to become a party defendant and to file an answer and a cross bill. Leave was granted and on December 18th,

1935, he filed his answer and cross bill and in so far as they set

up the interest of the cross complainant in the land involved the

answer and cross bill are in identical language. In said answer

and cross bill it is alleged that John S. Collins died testate on

October 27th, 1906, seized in fee simple of the lands described in

the bill and cross bill, and that by his will and the codicil thereto

he devised said lands to his wife Catherine Collins for life, with

remainder in fee to his children Anna, Frank and Joseph S. Collins,

the remainder to said children being subject, however, to the payment

of certain legacies to other children of said John S. Collins,

which legacies were made a charge upon said lands.

The exact language of the codicil charging said legacy

upon the land in question is:

"I do hereby revoke the devise in my said last will contained to my daughter, Mary Collins, of a fourth interest in remainder in my real estate and I do hereby give and bequeath to my said daughter in lieu of said remainder, the sum of Twenty-five Hundred Dollars (\$2500.00) to be a charge upon said real estate and to be paid to her as soon as may be after the death of my wife, by my children, Anna, Frank and Joseph, one-third to be paid by each.

I hereby give, devise and bequeath all of my real estate subject to the use of my wife, Catherine Collins, of the same for and during her life, to my children Anna, Collins, Frank Collins, and Joseph S. Collins, absolutely forever; charged, however, with the payment of legacies mentioned in said will, and the legacy of twenty-five Hundred Dollars (\$2500.00) to Mary Collins, mentioned in this codicil, said payment to be made as soon as may be after the death of my said wife."

The cross bill further alleges that Catherine Collins,

the life tenant, together with Anna, Frank and Joseph S. Collins, the remaindermen, mortgaged said lands to W. J. McBroom, on January 19th, 1909, to secure a loan of \$10,000.00, said mortgage being expressly made subject to the charge on said lands created by the said will; that said mortgage was foreclosed by a decree which directed the sale of said lands subject to the charge of said legacies; that the lands were so sold; that they were redeemed by the defendant Brown, who was a judgment creditor, and a sheriff's deed was issued to him on February 3rd, 1923, the said deed containing the provision that it was subject to the lien of said legacies and that during the pendency of the foreclosure suit Catherine Collins, the life tenant, died on February 8th, 1920.

The cross bill further charges that on February 10th, 1923, Lucy Collins Murphy, who was the legatee of the \$2500. legacy left by the said codicil, duly assigned and conveyed to Joseph S. Collins all her right, title and interest in and to the said lands, she at that time having no interest therein other than her said legacy, and that thereafter the said Joseph S. Collins assigned and conveyed the said lands to the cross complainant, appellant here, the deed of conveyance specifically alleging that it was the intention of said deed to transfer said legacy. The will, codicil and conveyances were attached to the cross bill as exhibits and made a part thereof.

The cross bill sets up that no part of said legacy has been paid, and prays for an accounting; that the defendants be decreed to pay the amount found to be due, and in default of such payment, that the land be sold.

The cross defendant Harry E. Brown filed a general demurrer to the cross bill which was overruled. He then filed an answer to the said cross bill. The answer of said Brown among other things denied that on February 10th, 1923, or any other date the said Lucy Murphy by the name of Lucy Collins Murphy or any other

the life tenant, together with Anne, Frank and Joseph E. Collins, the remaindermen, mortgaged said lands to W. J. Morrow, on January 12th, 1909, to secure a loan of \$10,000.00, said mortgage being expressly made subject to the charge on said lands created by the said will; that said mortgage was foreclosed by a decree which directed the sale of said lands subject to the charge of said legacy; that the lands were so sold; that they were redeemed by the defendant Brown, who was a judgment creditor, and a sheriff's deed was issued to him on February 2nd, 1923, the said deed containing the provision that it was subject to the lien of said legacy and that during the pendency of the foreclosure suit defendant Collins, the life tenant, died on February 8th, 1920. The cross bill further charges that on February 10th, 1923, Lucy Collins Murphy, who was the testate of the said Joseph E. Collins, left by the said will, duly assigned and conveyed to Joseph E. Collins all her right, title and interest in and to the said lands, she at that time having no interest therein other than her said legacy, and that thereafter the said Joseph E. Collins assumed and conveyed the said lands to the cross complainant, appellant here, the deed of conveyance specifically alleging that it was the intention of said deed to transfer said legacy. The will, to wit, and conveyances were attached to the cross bill as exhibits and made a part thereof. The cross bill sets up that no part of said legacy has been paid, and prays for an accounting; but the defendant is decreed to pay the amount found to be due, and in default of such payment, that the land be sold. The cross defendant Henry E. Brown filed a demurrer to the cross bill which was overruled. He then filed an answer to the said cross bill. The answer of said Brown among other things denied that on February 10th, 1923, or any other date the said Lucy Murphy by the name of Lucy Collins Murphy or any other

name assigned or conveyed to Joseph S. Collins and interest whatever in her claim to such legacy but alleged that the said Joseph S. Collins on or about the date last above mentioned did pay the said Lucy Murphy the sum of \$650, in full payment of her ^{said} legacy as said codicil provided the said three children should do and that on or about said date the said Joseph S. Collins received a release of said legacy. The answer also denied that on the 27th, day of March, 1925, or any other date the said Joseph S. Collins assigned or conveyed to the said cross complainant any interest in said legacy.

Said cross defendant further answering says that said Joseph S. Collins has not conveyed in any way any interest in said legacy or in said real estate to said cross complainant and denies that the said cross complainant has any interest in said legacy or any interest in said real estate whatever but that the said Joseph S. Collins realizing that he had no claim for said legacy did enter into a conspiracy with James Norton whereby he, the said James Norton, cross complainant herein, did pretend to be the owner of said legacy and attempted to collect the same from this cross defendant.

The answer of said Brown also set up the fact that the said legacy has been paid in full by said Joseph S. Collins by his paying to said Lucy Collins Murphy the sum of \$650. and that the said Lucy Collins Murphy did release all interest or claim that she had in said legacy.

The cause was heard in open court after issue was joined. No oral testimony was offered by appellant. The evidence was entirely documentary. The court after a hearing dismissed appellants cross bill for want of equity. Appellant then filed a motion for leave to amend his cross bill and answer claiming an interest in the legacy from the death of the life tenant and reasserting the assignment of the legacy by Lucy Collins Murphy to the said

name said, or conveyed to Joseph S. Collins and interest the above
in her claim to the said estate, and that the said
Collins on or about the date last above mentioned did by the said
Lucy Murphy, his wife, execute a will, in which he bequeathed as

or said Lucy Murphy, his wife, did execute a will, in which he bequeathed as
Joseph S. Collins, or any other date the said Joseph S. Collins said not
on conveyed to the said cross complainant any interest in said

Said cross defendant further answering says that said
Joseph S. Collins has not conveyed in any way any interest
legacy or in said estate to said cross complainant
that the said cross complainant has any interest in said legacy
est in said real estate whatever but that the said Joseph
S. Collins realizing that he had no claim for said legacy did enter
into a conspiracy with James Norton whereby he, the said James
Norton, caused the said cross complainant to collect the same from the

had in said legacy.
The cause was heard in open court after issue was
No oral testimony was offered by applicant. The evidence
The court after a hearing dismissed
Applicant then filed a
his cross bill and answer claiming an
tenant and possessor
ing the assignment of the law by Lucy Collins Murphy to the said

Joseph S. Collins increasing the amount of consideration and alleging the intention to assign the same. The court denied said motion to amend on the ground that the amendment did not include any new matter that was material and this appeal followed. The only question involved on this appeal is whether or not the court erred in dismissing appellants cross bill and in refusing leave to amend the same.

It will be observed that the appellant relies upon an alleged assignment of Lucy Collins Murphy to Joseph S. Collins of all her right, title and interest in and to the lands involved and subsequently by Joseph S. Collins to the appellant.

In the decision of the question involved in this proceeding it is important to keep in mind the language employed by the testator John S. Collins in the codicil by which Lucy Collins Murphy received the legacy in question, namely: "And I do hereby give and bequeath to my said daughter in lieu of said remainder the sum of \$2500.00 to be charged upon said real estate and to be paid to her as soon as may be after the death of my wife by my children Anna, Frank and Joseph S. one-third to be paid by each."

It will be seen from the codicil of the said John S. Collins that the testator made it the duty of Anna, Frank and Joseph S. Collins to pay the legacy of \$2500.00 to Lucy Collins Murphy. The record discloses that the said Anna, Frank and Joseph S. Collins accepted the benefits of their father's will and it was therefore incumbent upon them to pay the legacy, a duty imposed upon them by the will, to the legatee, Lucy Collins Murphy. The record discloses that Joseph S. Collins on February 10th, 1923, paid to his sister, Lucy Collins Murphy, the sum of Six Hundred and Fifty Dollars (\$650.) and that she at the same time executed to him a quit claim deed of all her interest, either in possession or

... S. Collins instructed the court of probate and ...
... the intention to use the name. The court ...
... to amend on the ground that the amendment did not include any
new matter that was material and this appeal is allowed. The only
question involved in this case is whether or not the court erred
in dismissing appellants cross bill and in retaining leave to amend.

It will be observed that the appellant relies upon an
assignment of interest in the Collins Murphy to Joseph S. Collins of
all her right, title and interest in and to the lands involved and
apparently by Joseph S. Collins to the appellant.
In the decision of the question involved in this pro-
ceeding it is important to keep in mind the language employed by
the testator John S. Collins in the codicil by which Lucy Collins
Murphy received the legacy in question, namely: "And I do hereby
give and bequeath to my said daughter in lieu of said remainder the
sum of \$2500.00 to be charged upon said real estate and to be paid
to her as soon as may be after the death of my wife by my children
Frank and Joseph S. one-third to be paid by each."

It will be seen from the recital of the said John S.
Collins that the testator made it the duty of Anna, Frank and
Joseph S. Collins to pay the legacy of \$2500.00 to Lucy Collins
Murphy. The record discloses that the said Anna, Frank and Joseph
S. Collins accepted the benefits of their father's will and it was
therefore incumbent upon them to pay the legacy, a duty imposed upon
them by the will, to the legatee, Lucy Collins Murphy. The record
discloses that Joseph S. Collins on February 10th, 1928, paid to
his sister, Lucy Collins Murphy, the sum of Six Hundred and Fifty
dollars (\$650.) and that she at the same time executed to him a
quit claim deed of all her interest, either in possession or

expectancy to the land upon which her legacy was made a charge. The quit claim deed merely conveyed according to its language, the interest of the said Lucy Collins Murphy either in possession or expectancy. Not having an interest in possession she could convey nothing. By the terms of the codicil, Lucy Collins Murphy received the legacy to be paid in cash by her brothers and sister and in no way received an interest in the land, The lien of the charge created by the codicil is in the nature of an equitable lien only and when satisfied by payment no longer exists. The clear intention of the testator, John S. Collins, was that his three children on their receiving the land in question should pay to their sister, who received no part thereof, the legacy in question. The contention of the appellant that the land remained the primary fund and that the three children were merely sureties is not based upon authority. The cases cited by appellant with reference to the doctrine that where land is mortgaged, it remains the primary fund and subject to the mortgage indebtedness are not controlling as the law in this cause. The mortgage lien and the lien created by the charge on the land are not the same, as the mortgages in Illinois has the legal title as between him and the mortgagor. In our opinion the quit claim deed executed by Lucy Collins Murphy operated as a release of the legacy to her brother, which he was bound to pay to her under the terms and provisions of the codicil of the testator John S. Collins. We do not think there is any merit in the contention of appellant that the quit claim deed operated as an assignment of interest in the land in controversy. There is a clear distinction between an assignment and a release. A release terminates not only the releasor's interest in the claim in question, but also the claim itself, while an assignment terminates the claim only as far as the releasor is concerned, leaving it in full force as to the party discharged. 34 Cyc 1043.

The words "all right, title and interest" as used in a quit claim deed are words of release and quit claim only. 18 Corpus Juris 316.

In the case of Williams vs Wsten, 179 Ill. 267, where the construction of a quit claim deed was before the court, it was held that where the word "release" was used in the granting clause, that the deed was a release deed. The statute declares that the statutory form of quit claim deed "shall be deemed and held a good and sufficient conveyance, release and quit claim."

The lien of a charge on land is satisfied by payment to the legatee or to a person authorized to receive payment. 40 Cyc 2047.

The lien is discharged by a release provided it is by one having the authority to release it. 40 Cyc 2047.

A release by an heir of his expectancy operates, not as a transfer or conveyance to either the ancestor or other heirs of the estate which would descend to him upon the death of the ancestor, but rather as an extinguishment of his right to take any estate by descent. Crumb vs Sawyer, et al, 132 Ill. 443-463.

In conclusion we are of the opinion that when Joseph E. Collins paid the \$650.00 to Lucy Collins Murphy, the charge on the land in question was released and that the quit claim deed executed by her operated as a release of the charge against the land.

We are of the opinion, therefore, that the order and decree of the Circuit Court of Henry County, dismissing the cross bill of appellant and in refusing him leave to amend, should be affirmed which is accordingly done.

Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hercunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

248 L.A. 6707

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 7 - 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

OCTOBER TERM, 1927.

| | | |
|--------------------------|---|-------------------------------|
| Thomas H. Harvey, et al. | : | |
| | : | |
| Appellant. | : | |
| | : | |
| - VS - | : | APPEAL FROM THE CIRCUIT COURT |
| | : | |
| Edward E. Jacobs, et al. | : | OF DUPAGE COUNTY. |
| | : | |
| Appellee. | : | |

Jett, P. J.

The record discloses that on the 9th day of December, 1926, a bill of complaint was filed in the Circuit Court of DuPage County, by Thomas H. Harvey, Ardel J. Lyons, John Kloss, Andrew J. White, Harry H. Doan, John Fredrich, George Peppein, L. E. Buck, George W. Siebert, and Henry Frost, in which they represented that they were citizens, property owners and tax payers in the Village of Westmont, DuPage County.

It is further charged in said bill that Edward E. Jacobs is and has been President of the Village Board since April, 1925; that Joseph C. Arey, Frank L. Misk, Edward W. Behrens; Charles G. Dunham, John D. Morey, and W. A. Michelis have been members of the Board of Trustees since April 1926; that Irving Green is Village Clerk and D. L. Townsend is Village Treasurer; and William R. Friedrich is Village Attorney, employed upon a salary, and has been acting as such since April, 1926;

It is further alleged, among other things, that Edward E. Jacobs, Joseph C. Arey, and Frank L. Misk, are members of the Board of Local Improvements of said Village, and have usurped and continued to usurp the authorities and powers belonging only to the Board of Trustees.

It is also charged in said bill of complaint that the defendants, on or about August 27th issued,

...

APPEAL FROM THE CIRCUIT
OF DUPAGE COUNTY.

Thomas M. Harvey, et al.
Appellant.
- VS -
Edward E. Jacobs, et al.
Appellee.

...

The record discloses that on the 3th day of December, 1936, a bill of complaint was filed in the County of DuPage County, by Thomas M. Harvey, Angel J. Lyons, John Elise, et al., White, Harry H. Dorn, John Friedrich, George L. Elise, et al., Siebert, and Henry W. Post, in which they requested that certain citizens, property owners and tax payers in the Village of Westmont, DuPage County.

It is further charged in said bill that Edward E. Jacobs is and has been President of the Village Board since April, 1936; that James C. Aray, et al., have been members of the Board of Trustees since April 1936; that Irving Green is Village Clerk and is employed as Village Attorney; and William R. Friedrich is Village Attorney, employed as such since April, 1936; It is further alleged, among other things,

that Edward E. Jacobs, Joseph C. Aray, and Frank L. Misk, are members of the Board of Local Improvements of said Village, and have usurped and continued to usurp the authorities and powers belonging only to the Board of Trustees.

It is also charged in said bill of complaint that the defendants, et al., have wrongfully and unlawfully

and caused to be signed by Jacobs, as president of the board of local improvements, a warrant drawn upon the treasurer of said Village of Westmont, for the sum of \$610 payable to William R. Friedrich, which was paid to Friedrich on the advice of William R. Friedrich, as village attorney out of the village funds for fees in addition to his salary.

That the defendant Jacobs, Arey, and Misek, as the board of local improvements, issued another warrant from the treasurer for \$3,900 payable to William Worth, not signed by the President of the village nor countersigned by the clerk of the village, or under the seal of the village as required by statute, and that the contract of Worth, of which said payment was purported to be made, was not signed by the Clerk, nor mayor, of the village, nor under the seal of the village, but purported to be made by the board of local improvements.

That on or about the 22d day of November, 1926, defendants, Arey, Misek, and Jacobs, as board of local Improvements, issued another warrant upon the treasurer of said village for \$1,735, and which the treasurer, on the advice of the defendant Friedrich, paid; that the said warrant was not signed by the president of the village, nor countersigned by the clerk of the village, nor did it bear the village seal as required by statute.

That on or about November 23d, Jacobs, Arey and Misek, as board of local improvements, issued a further warrant for \$2,000 upon the village treasurer, not signed by the president of the village board, nor countersigned by the village clerk, nor was it sealed with the village seal, contrary to the statute of the State of Illinois.

That on or about November 30th said three defendants issued a further warrant on the village treasurer for \$263 not signed by the president, nor clerk of the village, nor bearing the seal of the village, as required by the statute.

and signed by Jacob, as president of the board
of local improvements, a warrant drawn upon the treasurer of
Village of Westmont, for the sum of \$610 payable to William R.
Friedrich, which was paid to Friedrich on the advice of William
R. Friedrich, as village attorney out of the village funds for
fees in addition to his salary.

That the defendant, Jacob, issued another
warrant for \$3,900 payable to William North, not signed by the
president of the village nor countersigned by the clerk of the
village, or under the seal of the village as required by statute,
and that the contract of North, of which said payment was pur-
ported to be made, was not signed by the clerk, nor mayor, of
the village, and that the seal of the village was not used in
the said warrant.

That on or about the 22d day of November, 1926, defendant, Jacob,
issued a warrant for \$1,000 payable to the village, not signed by the
president of the village, nor countersigned by the clerk of the village,
and that the seal of the village was not used in the said warrant,
and that the said warrant was not signed by the president of
the village, nor countersigned by the clerk of the village, nor
did it bear the seal of the village.

That on or about November 22d, 1926, defendant,
Jacob, issued a warrant for \$1,000 payable to the village, not signed by the
president of the village, nor countersigned by the clerk of the village,
and that the seal of the village was not used in the said warrant,
and that the said warrant was not signed by the president of
the village, nor countersigned by the clerk of the village, nor
did it bear the seal of the village.

That on or about November 20th, 1926, defendant,
Jacob, issued a warrant for \$1,000 payable to the village, not signed by the
president of the village, nor countersigned by the clerk of the village,
and that the seal of the village was not used in the said warrant,
and that the said warrant was not signed by the president of
the village, nor countersigned by the clerk of the village, nor
did it bear the seal of the village.

That your orators fear that unless restrained by the order of injunction said warrants will be paid and the treasurer of the village of Westmont will be depleted and that further warrants may be drawn and payments made to William Worth illegally and the funds of the village be thereby depleted.

That in further usurpation of authority said board of local improvements are planning and threatening to grant to the Chicago, Burlington & Quincy Railroad Co. an easement and right of way over and adjoining on the north, the present right of way of the Chicago, Burlington & Quincy Railroad Co., in consideration of putting in an old iron bridge or span, taken out from some other location insufficient for any except foot passengers. That the real value of said right of way is upwards of \$20,000 and the cost and expense of putting in this foot bridge will be less than \$1,000; that the board of local improvements are threatening to grant to the Chicago, Burlington & Quincy Railroad Co., this valuable right of way for said insignificant consideration, and your orators believe that unless restrained, they will make, execute and deliver some pretended or alleged grant or contract to the Chicago, Burlington & Quincy Railroad Co. which will be expensive to the village and your orators as tax payers, either to carry out or to avoid and defeat.

On said December 9th, 1926, an order for an injunction, reciting among other things, that it appears that Edward E. Jacobs, Joseph C. Arey, and Frank L. Misek, pretending to act as a Board of local improvements, have illegally issued and caused to be paid certain warrants, and are threatening to issue others without authority of law, and are threatening to dispose of valuable property and rights of the village of Westmont, without

That your orators fear that unless restrained by the order of

the court said warrants will be paid and the preservation of

the village of Westmont will be depleted and that further warrants

may be drawn and payments made to William North illegally and the

funds of the village be thereby depleted.

That in further violation of authority said board of local im-

provements are planning and threatening to grant to the Chicago,

Burlington & Quincy Railroad Co. an easement and right of way.

over and adjoining on the north, the present right of way of the

Chicago, Burlington & Quincy Railroad Co., in consideration of

providing in an old iron bridge or span, taken out from some other

location.

That the value of the property of the village of Westmont, and

and expense of putting in this foot bridge will be less than

\$1,000; that the board of local improvements are threatening to

grant to the Chicago, Burlington & Quincy Railroad Co., this

valuable right of way for said insignificant consideration, and

your orators believe that unless restrained, they will make

execute and deliver some pretended or alleged grant or contract

to the Chicago, Burlington & Quincy Railroad Co.

expensive to the village and your orators, as tax payers, either

to carry out the same.

On said December 31st, 1926, and order for an injunction, reading

among other things, that it appears that Edward E. Jacobs,

Joseph C. Aray, and Frank L. Misk, pretending to act as a

Board of Local Improvements, have illegally issued and caused

to be paid certain warrants, and are threatening to issue others

without authority of law, and are threatening to dispose of

the village of Westmont, without any

authority of law and that the irreparable damage will result to the Village of Westmont if an injunction is not issued forthwith.

A temporary injunction was issued, restraining the defendants from paying, or honoring any warrants on the treasurer of the Village, unless signed by the President of the Village and countersigned by the clerk of the Village of Westmont; also from issuing or delivering warrants unless countersigned by the clerk of the Village, and also from making, as Board of Local Improvements, any conveyance or lease of any part of Burlington Avenue, except as authorized by law, upon complainant's giving an injunction bond in the sum of \$1000.00. Edward E. Jacobs, Joseph E. Arey, Frank L. Misek, appellees and D. L. Townsend, treasurer of said Village and certain other party defendants were served with process and enjoined. On January 7th, 1927, Jacobs, Arey, Misek, Townsend and William R. Friedrich, entered a motion to dissolve the temporary injunction. On a hearing of the motion to dissolve the injunction, the same was allowed and a suggestion of damages was made on behalf of said defendants last mentioned, with the exception of the said William R. Friedrich, whereupon the chancellor ordered the complainants, (appellants herein) to pay the appellees for their damages by way of attorney's fees, the sum of \$500.00. This appeal is from that order and the question involved in this proceeding is whether or not the allowance of solicitor's fees is excessive. We have examined the testimony of the various witnesses, and while the record discloses that the court permitted some of the witnesses to testify as to what they thought was a reasonable fee, instead of what was the usual and customary charge for such services, we are not prepared to say, that by reason thereof any reversible error was committed. The rule is that upon the question of allowance of solicitor's fees, the court itself is recognized as having a practical knowledge of the usual and customary fees charged by attorneys for the services rendered in a

authority of law and that the irreparable damage will result to the Village of Westmont if an injunction is not issued forthwith. The court, restraining the

of the Village, unless stayed by the President of the Village, was enjoined by the clerk of the Village of Westmont; also from issuing or delivering any notice unless so directed by the clerk of the Village, and also for making, as Board of Supervisors, any conveyance or lease of any part of Burlington

Joseph H. Arvey, Frank L. Miskel, appellants and D. L. Townsend, respondents of said Village and certain other party defendants were served with process and enjoined. On January 22, 1927, Jacobs, Arvey, Miskel, Townsend and William R. Tisdal, entered a motion to dissolve the temporary injunction. On a hearing of the motion to dissolve the injunction, the same was allowed and

of attorney's fees, the sum of \$500.00. The appeal is from that order and the question involved in this proceeding is whether or not the allowance of solicitor's fees is excessive. We have

examined the testimony of the various witnesses, and while the record discloses that the court permitted some of the witnesses to testify as to what they thought was a reasonable fee, instead of what was the usual and customary charge for such services, we are not prepared to say, that by reason thereof any reversible error was committed. The rule is that upon the question of allowance of solicitor's fees, the court itself is recognized as having a practical knowledge of the usual and customary fees charged by attorneys for the services rendered in a

particular proceeding and that the judgment of the court will not be interfered with unless some palpable wrong has intervened. The amount in this case, as fixed, by the witnesses varied from \$500.00 to \$1000.00. Under the circumstances as disclosed by the record, we are of the opinion the court was justified in making the allowance of \$500.00. After an examination of the record and all of the questions raised by the appellants, we are of the opinion that the court was within the rule in fixing the allowance at \$500.00.

The order therefore, allowing \$500.00 for solicitor's fees is affirmed.

Order and Decree is affirmed.

... ..

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the _____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

7862
v. ~~W. F. F.~~

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2431.A. 0.1

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 7 - 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A. D., 1927.

JAMES E. BENNETT, FRANK A.)
MILLER, FRANK J. SAIBERT,)
and FRANK F. THOMPSON, co-)
partners doing business as)
JAMES E. BENNETT & COMPANY,)
Appellees,)
v.)
SAMUEL JACOBSON.)
Appellant.)

Appeal from
Circuit Court
LaSalle County.

OPINION by BOGGS, J.

On September 7, 1922, appellees began an attachment suit in the Circuit Court of LaSalle County against appellant to recover \$1,814.52, alleged to be due for commissions and interest on stocks bought and sold by appellees for appellant. Upon issue being joined, there was a trial by jury, judgment for appellee and an appeal was prosecuted to this court, where the judgment was reversed on account of erroneous instructions (232 App. 633). Upon the cause being reinstated, in the trial court, appellees filed an amended declaration, consisting of the common counts, and alleged damages in the sum of \$2,500. Appellant filed the general issue, together with an affidavit that he was not indebted to the appellees, but that all lawful accounts charged to him by appellees had been paid in full; that all their claims were on account of gambling transactions, to be settled upon margins; that appellant paid to appellees during the transactions \$10,000 more than he received from them, which amount was lost by him and won by them, and that he

APPELLATE COURT OF ILLINOIS

October Term, A. D., 1927.

Appeal from
Circuit Court
Lassalle County.

JAMES E. BENNETT, FRANK A.
MILLER, FRANK J. SAIBERT,
and FRANK W. THOMPSON, co-
partners doing business as
JAMES E. BENNETT & COMPANY,
Appellees,
v.
SAMUEL JACOBSON.
Appellant.

OPINION BY ROGERS, J.

On September 7, 1923, appellee began an attachment suit in the Circuit Court of Lassalle County against appellant to recover \$1,814.52, alleged to be due for commissions and interest on stocks bought and sold by appellees for appellant. Upon issue being joined, there was a trial by jury, judgment for appellee and an appeal was prosecuted to this court, where the judgment was reversed on account of erroneous instructions (232 App. 633). Upon the cause being reinstated, in the trial court, appellee filed an amended declaration, consisting of the common counts, and alleged damages in the sum of \$2,500. Appellant filed the general issue, together with an affidavit that he was not indebted to the appellees, but that all lawful accounts charged to him by appellees had been paid in full; that all their claims were on account of gambling transactions, to be settled upon margins; that appellant paid to appellees during the transactions \$10,000 more than he received from them, which amount was lost by him and won by them, and that he

never received anything of value for said losses. There was a trial by a jury, judgment for appellant, from which judgment appellees prosecuted an appeal to this court. After the judgment was rendered, appellee entered into a recognizance pursuant to section 15 of the Attachment Act, the attachment was dissolved, thus changing the suit from a proceeding in rem to one in personam. Said cause was again reversed, on the ground of the giving of erroneous instructions and on account of prejudicial remarks made by counsel for appellee during the trial of said cause, the opinion having been filed May 29, 1926 (242 App. 647). The third trial resulted in a verdict and judgment in favor of appellees in the sum of \$2389.00. To reverse said judgment, this appeal is prosecuted.

On the first appeal of this cause to this court, we made a sufficient statement of the facts, and it will not be necessary to repeat them.

It is first contended by counsel for appellant that the court erred in permitting Frank Grennan, who was in charge of appellees' office at Streator to testify over objection "as to facts which occurred in Chicago and in New York, while he was in Streator", etc.

Grennan was not asked on his direct examination, nor did he testify with reference to what occurred in Chicago or in New York touching the transactions in question. This witness testified on his recross examination: "I had nothing to do with the Chicago or New York office. Was never down there in reference to this business." The court did not err in its rulings on this testimony.

It is also insisted that the court erred in permitting G. E. Barker, the head bookkeeper of appellees in their office in Chicago, to testify with reference to the transactions carried on by appellees for appellant on the New York Stock Exchange, for the reason that said witness was not present when such transactions took place.

may have received anything of value for said losses. There was a
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rendered, appellee entered into a recognizance pursuant to section
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ing the suit from a proceeding in rem to one in personam. Said
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instructions and on account of prejudicial remarks made by counsel
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in a verdict and judgment in favor of appellee in the sum of
\$23889.00. To reverse said judgment, this appeal is prosecuted.
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repeat them.

It is first contended by counsel for appellant that the
court erred in permitting Frank Grenman, who was in charge of ap-
pellee's office at the time the transactions in question "as to which
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to testify.

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Barker, the lead bookkeeper of appellee in their office in Chicago,
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lees for appeal and on the New York stock exchange, for the reason
that said witness was not present when such transactions took place.
That said witness was not present when such transactions took place.

All of the records of appellees' Chicago office were made and kept under Barker's supervision. He testified that they were made in the regular course of business; that they contained the first permanent and original entries in the account, were true and correct and were made by individuals on the day of the transaction and in the regular course of their employment. He further testified that the entries were made by four different individuals, whose present addresses he did not know. Appellees' exhibits 2, 3, 4, 5 and 6, identified by Barker as records from his office, were offered and received in evidence without objection.

It is practically conceded by counsel on both sides that the evidence on this last trial was practically the same as on the former trials. In the opinion filed on the first hearing, this court, said: "The evidence of appellants (appellees here) tends to show that each and every one of the transactions with appellee (appellant here) were executed. In executing these transactions, the orders were sent to Chicago from Streator, and then to New York, where they were executed in the New York Stock Exchange." By this language we in effect held that the evidence of Barker as to how the business of appellees' office was carried on between its Chicago and New York offices, and as to how the transactions of appellant were handled, was competent, and that holding is the law of the case. Lusk v. City of Chicago, 211 Ill. 183-188; People v. Waite, 243 Ill. 156-160; Village of Oak Park v. Swigart, 266 Ill. 60-61; Mariner v. Gilchrist, 280 Ill. 544-549; People v. Young 309 Ill. 27-30; City of Chicago v. Collin, 316 Ill. 104-113.

Counsel for appellant in practical effect contend that, in order to prove the execution of appellant's orders for the purchase or sale of stocks on the New York Stock Exchange, the witnesses who had to do with the various details of such transactions should have been produced. This is not necessary. P. C. C. & St. L. R. Co. v. City of Chicago, 242 Ill. 178-193; Kenna v. C. H. & S. E. R. Co.

206 App. 17, 38-39, affirmed 284 Ill. 301; 22 Corpus Juris, 215; Grayson v. Lynch, 163 U. S. 468, 480-481; Wagner v. C. R. I. & P. R. Co., 277 Ill. 114. In the latter case the court at page 117 says:

"The next ruling complained of is that the court refused to strike out testimony of the plaintiff that the cars were loaded with cotton seed meal and came from Tennessee, when it appeared from cross examination that he only knew where they came from by looking at the way-bills. The ground of the objection was that the way-bills were the best evidence. * * * But the way-bills did not come within that rule, not being documents executed between the parties to the suit or amounting to anything more than memoranda where the cars came from, of the same nature as marks on the cars tending to prove that the cars were employed in inter-State Commerce. It was not necessary to produce the way-bills or records. Devine v. Chicago, Rock Island and Pacific Railway Co. 266 Ill. 248."

In Grayson v. Lynch, supra, the court at pages 480-481, says:

"The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they become disseminated throughout the country. Spring Co. v. Edgar, 99 U. S. 645; State v. Wood, 53 N. H. 484; Dole v. Johnson 50 N. H. 452; Emerson v. Lowell Gas Light Co., 6 Allen 148."

In 22 Corpus Juris, 215, the author says: "It is considered

however, that knowledge acquired in the line of official duty or employment is not objectionable as based on hearsay."

In F. C. C. & St. L. R. Co. v. City of Chicago, supra, the court at page 193 says:

"In determining what is the best evidence the nature of the case will admit of, and what is secondary evidence, regard must be had, to some extent, to the nature and character of the business to which the evidence relates and the method of its conduct. In a case like the one under consideration it would seem impracticable that the record of the movement of the vast number of cars appellee was required to deal with could have been a book of original entries. It is easily seen that the correctness of such a record is of the utmost importance to the common carrier for which it is kept. It was made in due course of business and according to methods, whose accuracy had been tested for many years, and there can be no doubt from the preliminary proof that it was as reliable as if it had been a book of original entries or the reports from which it was made had been produced. * * *

"In the nature of things it would be well-nigh impossible to preserve and produce the original reports from which these records are made up, and it would be impracticable, if they were preserved, to use them as evidence on a trial."

In Kenna v. Calumet, H. & S. E. R. Co., supra, the court at pages 38 and 39 says:

"The admission of evidence of an entry of record, made in the regular course of business or in the discharge of a duty is, in reality, not an exception to the hearsay rule. Such an entry constitutes an affirmative act of the party making it, and where there is every inducement to make it accurately and correctly. The admission of the entry is, therefore, not the admission of hearsay testimony, or merely of an unsworn statement, but the very fact that

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the entry was made is, in itself, the strongest evidence that the event recorded actually happened."

The record discloses that appellant subjected the witness Barker to a detailed cross examination with reference to the keeping of the records, etc., in appellees' Chicago office, and as to how the purchases and sales were carried on on the Stock Exchange in New York. The jury had the full benefit of the information possessed by this witness, and were in a position to give to his testimony the weight, if any, to which it was entitled.

Then too the following question was asked of and answered by Barker, without objection:

"Q. Will you state whether or not they (the orders made by appellant) were executed?

"A. They were."

The court did not err in its rulings in connection with the testimony of this witness.

It is contended that the record discloses that the deals in question were mere bucket-shop transactions. It is only necessary to say that the question whether these were gambling transactions was submitted to the jury by numerous instructions offered by appellant, and there is no evidence in the record tending to show that the business being conducted by appellees was a bucket-shop business. In Pelouze v. Slaughter, 241 Ill. 215, the court in dis-

cussing the question as to whether certain transactions were gambling transactions, makes a distinction between stock transactions and grain transactions, and in discussing the same at page 228 says:

"While the purchases were for large amounts of stock, there were frequent corresponding sales, and it does not appear that there ever was a balance against Mrs. Thompson above the market value of the stocks, which she could not pay. * * * The transactions were not contracts for purchases and sales where the subject matter was to be delivered in the future, which is a quite common form of gambling in

grain and other commodities, and the inferences as to the intention to receive or deliver which attend such transactions, are absent,"

It is also insisted that the court erred in refusing to permit appellant to offer evidence as to certain grain transactions which he claims to have had with appellees prior to said stock transactions, and which appellant insists were gambling transactions, as tending to show the character of the business being transacted between appellees and appellant. Appellant went into these grain transactions to as great an extent as was warranted, inasmuch as it is conceded that such transactions were not involved here. The court did not err in its rulings on this question.

It is also insisted that there was a failure on the part of appellees to show a compliance with the so-called blue sky laws of this state. This defense was not raised by the pleadings, and was not relied on by appellant in his affidavit on merits or notice of defense. It was therefore not an issue in the case. Reddie v. Looney, 208 App. 413-420; McClintock v. Lake Forest University, 222 App. 468-472; Colfax Grain Co. v. Bradford, 225 App. 419-422; Garford M. T. Co. v. Millers Co., 230 App. 622-624. The greater part of the stocks dealt in by appellant were stocks quoted on the New York or Chicago Stock Exchange lists. Those stocks would not come under the ban of the blue sky law.

It is next insisted that, waiving the question of the illegality of said transactions, there was no competent evidence in the record tending to show an indebtedness to appellees.

Grennan on the part of appellees and appellant on his own behalf, testified that the last transaction appellant had with appellees with reference to the purchase or sale of stock occurred in November, 1919. The testimony of Barker is to the effect that on two occasions subsequent to that time, appellant called on him in appellees' office in Chicago, and that he exhibited appellant's account to him; that appellant looked it over and stated that it was

correct. He further testified that he asked appellant "when we could expect payment, and he told me he had endeavored to liquidate some securities he had which the firm of Jones and Baker were carrying for his account, and as soon as he could, he would apply proceeds to the indebtedness he owed. Saw him again in early part of April, 1920. I am not certain the date; it was in Chicago. He discussed his account, and I asked him when we could expect balance due us. He said he tried to liquidate before April 1st, and particularly assured me we would not take any loss, if we could have a little more patience with him. He agreed with my records."

The witness Grennan also testified that he had several conversations with appellant in his office around November, 1919; that he called appellant's attention to his account and the way that it stood, and asked him if he could do something toward the settlement of it; that appellant "said he could not do anything with it; that he would take care of it shortly. * * * I had conversation with him in regard to status of his account from time to time until some time late in the year 1920. I asked him about a settlement of his account, and at those times he said he was not in a position to take care of it, but would be taken care of at a later date."

The evidence in the record also is to the effect that, once a month, statements of appellant's account were mailed to him from appellees' office, and the evidence fails to disclose that any objections were ever made thereto. Then too, on December 13, 1919, on January 17, 1920, and on March 12, 1920, appellant wrote appellees' Chicago office inclosing each time a check for \$500., to be credited on his account, the last letter being as follows:

"Inclosed find check for \$500.00. Place same to my account and will try and send you a check next week too, if the market keeps up in good shape, and please cancel stop order on Wright martin as I intend to take up the stock, thanking you for all favors," etc.

This evidence clearly indicates that appellant recognized the account as being true and correct as set forth in the books of appellees, which the evidence shows he had examined.

In none of the instructions tendered by appellant was the question submitted to the jury to find whether or not appellant owed appellees as claimed by them, but the issue submitted to the jury was confined to the question as to whether or not the transactions had between appellant and appellees were gambling transactions. The instructions submitted, in effect, warranted the jury in finding in favor of appellees for the amount claimed by them, unless the jury should find that the transactions in question were gambling transactions. It therefore follows that, waiving the question as to whether or not these transactions were gambling transactions, that evidence in the record clearly preponderates in favor of the jury's verdict.

Appellant also contends that there could be no right of recovery in this case under the common counts. No such defense was interposed in appellant's notice of defense or affidavit of merits, and he cannot interpose the same for the first time on this, the third appeal to this court. Reddig v. Looney, supra; McClintock v. Lake Forest University, supra; Colfax Grain Co. v. Bradford, supra; Garford M. T. Co. v. Millers Co., supra. A declaration consisting of the common counts, however, is sufficient on which to base an action of this kind. Perin v. Parker, 126 Ill. 201-213.

It is also insisted that there was no right of recovery of interest in this case. The evidence discloses that the amount owing by appellant, if the same was not upon a gambling transaction, was ascertained and liquidated. It would therefore bear interest. Snitzler Adv. Co. v. Orr, 198 App. 98; Insk V. Throop, 189 Ill. 127-143; Luetgert v. Volker, 153 Ill. 385-390; Laughlin v. Hopkinson, 292 Ill. 80-86.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty_____

Clerk of the Appellate Court

W. H. H. H.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

240 100 071 2

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 7 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District.

February Term, A. D., 1928.

| | | |
|------------------------------|---|--------------------|
| GEORGE E. CEVENE and GLADYS |) | |
| K. CEVENE, |) | |
| Appellees. |) | Appeal from |
| vs. |) | Circuit Court, |
| ELIZABETH F. WEIR and ERNEST |) | Winnnebago County. |
| C. STOKBURGER, |) | |
| Appellants. |) | |

OPINION by BOGGS, J.

Appellees filed a bill in the Circuit Court of Winnebago County against appellants, charging that on October 12, 1925, being desirous of purchasing a dwelling, they were approached by a Mrs. Hough, who stated that she was representing appellant E. C. Stokburger who had a house and two lots for sale in Central Park Subdivision of Rockford; being lots five and six in block eight in said subdivision; that said lots could be purchased, with the house and improvements thereon, for \$5,500; that thereafter appellant Stokburger informed them that the property in question consisted of two lots and that the price was \$5,500, \$600 to be paid in cash and the balance to be paid in monthly installments of \$35 each; that there was a trust deed or mortgage on said premises for \$3,000 and that, when the payments reduced the principal to \$3,000, a warranty deed would be given, subject to said mortgage; that appellees "on the 12th day of October, 1925, informed Ernest C. Stokburger, one of the defendants, that they would take the property and

purchase it on the terms and conditions he had set forth to them"; that the record title to said property was in appellant Elizabeth F. Weir, a stenographer in the office of appellant Stokburger; that in drawing the contract for the sale of said premises, it was the intention of said parties to include said lots five and six, but by mutual mistake in the drawing of said contract, only lot six was included. The bill prays that the deed to appellees for said premises be reformed so as to include lot five, as was mutually intended.

Appellants filed an answer in which they denied all of the material allegations in said bill. A hearing was had in open court before the chancellor, a finding was made in favor of appellees and a decree was rendered granting the relief prayed. To reverse said decree, this appeal is prosecuted.

It is first contended by appellants that the finding and decree is against the manifest weight of the evidence.

The evidence on the part of appellees is to the effect that Mrs. Hough, a real estate agent, learning that appellees were desirous of purchasing a residence property, stated to them that she had a house and two lots for sale in Central Park for \$5,500; that appellees were shown the property by Mrs. Hough. Mrs. Cevene testified that after showing said property, Mrs. Hough stated: "Mr. Stokburger had the lots and she would call him right up and we could draw the contract up right away." After going to a telephone, she further stated, "We will go right down to Stokburger's office; I called him and told him that the house and two lots was sold and he could draw the contract right up." * * * She showed us the house and the garage and 'this is the other lot, she said, 'you can have a garden, it runs clear over here,' and she went over and showed it. Then we went to Stokburger's office and drew the contract." Mrs. Cevene also testified: "Mrs. Hough told me the numbers of the lots. She said lot five and six of Central Park, then said 'the house and two lots.'"

Appellees both testified that the terms of the contract were agreed on at Stokburger's office on Saturday, and on the following

that on the same and conditions he had not taken to them; that the record title to said property was in appellant Elizabeth M. Weir, a resident in the office of appellant Stockburger; that in drawing the contract for the sale of said premises, it was the intention of said parties to include said lots five and six, but by mutual mistake in the drawing of said contract, only lot six was included. The bill prays that the deed to appellees for said premises be reformed so as to include lot five, as well as lot six.

in which they denied all of the facts alleged in the bill except that the same were presented.

It is first contended by appellant that the weight of the evidence is against the manifest weight of the evidence.

On the part of appellee it is to the effect that appellant, learning that appellant, stated to them that she had a house for sale in Central Park for \$8,500; that appellees were the property by Mrs. Hough. Mrs. Gervene testified that after

Mr. Hough stated: "Mr. Hough, I am going to a telephone call and we could draw the contract up right away." She further stated, "We will go down to Stockburger's office. I called him and told him that the two lots were sold and he could draw the contract."

At this point, the record shows that the contract was drawn and the property was sold. The record further shows that the contract was drawn and the property was sold.

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Monday the final contract was signed. The evidence is to the effect that on the Saturday a note was given by appellees to appellant Stokburger for \$100, and that a receipt was given by Stokburger to appellees therefor. The evidence of appellees is to the effect that the note in question mentioned lots five and six. Neither the note nor the receipt were produced on the hearing. Appellant Stokburger testified that the receipt was returned to him when the contract was drawn, and that he presumed it had been destroyed, as he did not ordinarily preserve them after contracts were drawn.

The evidence of appellees is further to the effect that on Monday the contract had been prepared before they arrived; that appellant Stokburger stated that he would read it over to them, and that in reading it over he read the description as including lots five and six. Appellees further testified that they took possession of the vacant lot, and raised a garden thereon in the spring and summer of 1926; that they never knew, until August 1926, when they were proposing to sell said property through an agent named Paulson, that lot five was not included in the contract; that Paulson, in going over said contract, stated that it only included lot six. Mrs. Cevene testified that she thereupon called Mr. Stokburger and informed him of the omission of lot five, and he replied that it was a mistake, but that said lot had been sold to a man in Nebraska; that appellees, however, could use the lot until it was needed, as a garden. Appellees further testified that on the Saturday before the contract was drawn, Mrs. Hough was with them in appellant Stokburger's office, and that she stated, referring to appellees, that they "were the buyers that bought the house and two lots. She said that to Mr. Stokburger."

Mrs. Olson, who lived in the property adjoining said premises, testified that Mrs. Hough came to her door and asked to use the telephone; that when she called up she said, "'This you, Mr. Stokburger?' She says 'that that lot here in Central Park, one lot and a house and lot, I think I have a sale for.'"

Paulson, a real estate agent, testified that, a short time

prior to the sale to appellees, appellant Stokburger priced said house and two lots to him at \$5,500, \$1,000 cash payment. The evidence is also to the effect that appellant, for some six or eight days, up to and including September 28, carried the following advertisement of said lots in the Rockford Republican: "Worth part. Six room all modern bungalow. All oak; garage; two lots; all for \$5,500. \$500 down and \$35 per month. Best buy in town. Call Main 84, E. C. Stokburger Agency."

The undisputed evidence is to the effect that, while the title to the property was in appellant Elizabeth Weir, she had no interest in the same, appellant Stokburger being the owner thereof at the time of the making of said contract.

Appellant Stokburger testified that he never authorized Mrs. Hough to sell both of the lots in question; that he simply authorized her to show the house for sale, without giving her a legal description. He also testified that, in the receipt which he gave appellees, he specifically described the premises which were to be and were included in the contract, being lot six only. He also testified that in reading the contract to appellees, he did not read the description as lots five and six; that appellees had a copy of the contract while he was reading the same.

As to the conversation testified to by Mrs. Cevone, this witness also testified that what he said to her was not that there was a mistake in the contract, but that she was mistaken in her understanding that lot five was to have been included in the same. He did not, however, deny having told her that they could use lot five for their garden, or that said lot had been sold to a party in Nebraska, but testified that he did not remember what, if anything, he said with reference to the use of the lot.

Mrs. Hough testified that she never stated to appellees that she had the two lots for sale; that Mr. Stokburger had never given her the legal description of the property; that "He told me to just show the place

...to the sale of appellee, appellant Stokburger advised said house and
...to him at \$8,500, \$1,000 cash payment. Evidence is also to

...effect that appellee, for some six or eight days, up to and including
September 28, carried the following five pieces of said lots in the

...Republ... "North part. Six room all modern bungalow. All
...garage; two lots, all for \$8,500. \$800 down and \$32 per month. Best

...Call Main 847 E. O. Stokburger Agency."

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...

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...the two lots for sale. That Mr. Stokburger had never given her the
...description of the property; that "He told me to just show the place

up." She also testified: "The first time I knew the property was for sale was when I saw the ad in the paper. The price was in, and it was \$5,500, I think. The ad mentioned house and two lots." She also testified: "I didn't know whether there was one or two or three (lots); I was showing the house. Mr. Stokburger told me to show the house up. He didn't understand about the ad, and so of course I didn't know nothing about it, only to show the house up. It was my intention to show them the property I saw in the ad. We went out in the yard and they asked me when we went out on the lot, the dimensions." She also testified: "I showed the boundary lines."

The contract in question specified that appellees were to take the premises subject to said mortgage of \$3,000. The mortgage covered the two lots, and when due, appellant Stokburger notified appellees to come in, and appellees joined in an extension of the mortgage for the term of three years.

Appellant Stokburger testified with reference to the advertisement above mentioned, that he did not look after the advertisements in the newspapers; that he didn't know of this advertisement, and that it appeared for the last time in the issue of September 28, whereas he purchased the property on September 26; that said advertisement was run for the person from whom he purchased the property, and that after he purchased it, it was not for sale at that price.

Appellees testified that in August, 1926, they went with Mrs. Olson to the home of Mrs. Hough, and on that occasion "Mrs. Hough said she was surprised that lot five was not included in the contract. She also said she always had thought or understood that lots five and six were both included in the contract."

The testimony of Mrs. Olson was to the same practical effect.

"Where the evidence is conflicting, as it is in this case, a court of review will not disturb the finding of a chancellor upon a question of fact, unless it is clearly apparent the chancellor has committed error." Biggerstaff v. Biggerstaff, 180 Ill. 407; Elmstedt v.

Nicholson, 186 Ill. 580; Douty v. Driscoll, 203 Ill. 480; Amos v. American T. & S. Bank, 221 Ill. 100-105.

"The rule in chancery cases tried without a jury on oral evidence, is, as has been often stated by this court, that great weight should be attached to the finding of the chancellor, and his findings will not be reversed unless clearly and palpably contrary to the weight of the testimony." Beall v. Dingman, 227 Ill. 294-296, citing Dowie v. Driscoll, *supra*; Biggerstaff v. Biggerstaff, *supra*, 407; Baker v. Rockabrand, 118 Ill. 365; Hardy v. Dyas, 203 Ill. 211-216.

We are not prepared to say that the finding of the chancellor was against the manifest weight of the evidence. Rather, we are of the opinion that the evidence warranted the chancellor in his findings.

It is also contended by appellants that if the evidence on the part of appellees tended to prove any cause for equitable relief, it was on the ground that appellant Stokburger fraudulently misread said contract.

While there is some basis for this contention, still we hold that the charge of mutual mistake is supported by the evidence. The preponderance of the evidence is to the effect that Mrs. Hough was representing to appellees that she, as the agent of appellant Stokburger, proposed to sell appellees the two lots in question; that she so informed Stokburger, both over the telephone and in his office on Saturday. Stokburger recognized and ratified the agency of Mrs. Hough. He was therefore bound by her statements with reference to said property, the same being within the scope of an agency of that character. There is also evidence to the effect that, in the note executed on Saturday preceding the date of said contract, lots five and six were both mentioned. We would not be warranted in holding that the finding of the chancellor was erroneous, for the reason urged.

"The rule of law, that a mistake like this under consideration, to be susceptible of correction, must be mutual, does not mean that both parties must agree on the hearing that the mistake was in fact made, but that the evidence of mutuality in mistake should relate to the time of the

"The rule in chancery cases tried without a jury on oral evidence, as has been often stated by this court, that great weight

is to be attached to the finding of the chancellor, and his findings are not to be reversed unless clearly and palpably contrary to the weight

of the testimony." Beall v. Dwyer, 208 Ill. 400, citing Dwyer v.

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118 Ill. 385; Harby v. Dwyer.

We are not prepared to say that the finding of the chancellor

is manifestly wrong, and we are of the opinion that we are of the

opinion that the evidence warranted the chancellor in his

It is also contended by appellants that if the

appellants tended to prove any cause for error, it is

ground that appellant Stokburger fraudulently misused said contract.

While there is some basis for this contention, still we hold

in favor of the finding of the chancellor.

reference of the evidence as to the effect that Mrs. Kohn was represented

as that she, as the agent of appellant Stokburger, proposed

the two lots in question; that she so informed Stok-

burger, both over the telephone and in his office on Saturday

morning. He was therefore bound

to state with reference to said property, the same being within

the scope of an agency of that character. There is also evidence to the

effect that, in the note executed on Saturday preceding

the date of said contract, lots five and six were both mentioned.

In holding that the finding of the chancellor was erroneous, for the

reason stated.

"The rule of law, that a mistake like this under consideration

is susceptible of correction, must be applied, does not mean that both

parties must agree on the hearing that the mistake was in fact made, but

that the evidence at the hearing in mistake should relate to the time of the

execution of the instrument, and show that at that particular time the parties intended to say a certain thing and, by mistake of fact, expressed another." Scott v. Great Western Coal Co., 220 Ill. 36-42.

It is not what the parties may say about the transaction at the time of the hearing, but what was mutually intended by the parties at the time of the execution of the contract, that should control.

It is also insisted by counsel for appellants that appellees have forfeited their right to prosecute this bill on account of laches.

"While reasonable diligence is required of all parties in the transaction of business, it is not enough to prevent relief in case of a mutual mistake that the party complainant might, had he done all within his power, have ascertained the truth." Hoops v. Fitzgerald, 204 Ill. 325-330, citing Kelly v. Solari, 9 Mees. & Wellsby, 54; Bell v. Gardner, 4 M. & G. 11; Newton v. Tolles, 9 L. R. A. 50.

In view of the evidence above set forth, and of the fact that appellees went into possession of both of said lots upon the execution of said contract, and remained in possession thereof, we hold that they are not estopped from prosecuting their bill on account of laches.

For the reasons above set forth, the judgment and decree of the trial court will be affirmed.

Decree affirmed.

of the instrument, and show that at that particular time the parties intended to convey a certain thing and, by mistake of fact, expressed

Scott v. Great Western Coal Co., 230 Ill. 36-37.

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to prevent relief in case

right, had he done all within

Hooper v. Pittsburg

64 Bell v. Bell

Tollan v. Tollan, 9 A. 50.

In view of the evidence above set out, and of the fact that

went into possession of both of said lots upon the execution of

a contract, and remained in possession thereof, we hold that they are

opped from prosecuting their bill on account of laches.

For the reasons above set forth, the judgment and decree

are affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

2481.3-671

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2481.3-671³

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 11 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Elizabeth Warren, Appellee,

v.

Grand Lodge Brotherhood of
Railroad Trainmen, Appellant,

:
:
:
:
:
:

Appeal from the
Circuit Court of
Peoria County.

Jones J:

This is a suit instituted by appellee against appellant upon a benefit certificate issued by appellant to the husband of appellee in his lifetime. It was before this court on a former occasion. The facts appear in the opinion in that case. It is reported by memorandum decision in 231 Ill. App. 631.

In our former opinion we held that the statements by assured in his application for membership concerning his age and former membership in appellant's order, were representations and not warranties. In view of that holding, the burden was upon appellant to establish not only the falsity of those representations, but that the applicant knew they were false at the time they were made; and further that the representations were material to the risk. We also held that it was proper to show that the assured acted in good faith in making his answers. Our holding as to such matters is res adjudicata. It cannot be reviewed on a subsequent appeal in the same case. (Wolkau v. Wolkau 217 Ill. App. 471.)

It is conceded by both parties that when the insured made his application for membership in appellants order, its constitution and rules fixed the age limit of applicants at 45 years. Upon the second trial, appellee made a prima facie case as on the first trial. Appellant then introduced in evidence assured's verified declaration for total disability benefits, dated May 29, 1917, in which he gave the date of his birth as September 25, 1862, and his age as 55 years and 4 months.

Appellant also introduced the assured's application for membership dated January 1, 1909, in which he stated the date of his birth as September 25, 1867, and his age as 41 years and 8 months.

Elizabeth Warren, Appellee,

v.

Appeal from the
District Court of
Lebanon County.

Grand Lodge of Brotherhood of
Railroad Trainmen, Appellant.

Jones J.

This is a writ instituted by appellee against appellant

upon a benefit certificate issued by appellant to the husband
of appellee in his lifetime. It was before this court on a former
occasion. The facts appear in the opinion in that case. It is
reported by memorandum decision in 281 Ill. App. 681.

In our former opinion we held that the statements
by assured in his application for membership concerning his
age and former membership in appellant's were representa-
tions and not warranties. In view of that holding, the burden
was upon appellant to establish not only the falsity of those
representations, but that the applicant knew they were false
at the time they were made; and further that the representations
were material to the risk. We also held that it was proper
to show that the assured acted in good faith in making his
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(Wolken v. Wolken 217 Ill. App. 471.)

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its constitution and rules fixed the age limit of applicants
at 45 years. Upon the second trial, appellee made a prima facie
case as on the first trial. Appellant then introduced in

evidence assured's verified declaration for total disability
benefits, dated May 29, 1917, in which he gave the date of his
birth as September 25, 1862, and his age as 55 years and 4 months.

The application stated he had not previously been a member of the order. Assured's affidavit for a license to marry appellee dated September 16, 1897, in which he stated his age to be 34 years, and his letter to appellant of June 11, 1917, were also admitted in evidence. The letter reads:

"Peoria, Ill.,
1917, June, 11.

Mr. E.E. King G.S. & T.T.M.

In reply to my exact date of birth the dates which I furnished are about as accurate as can be found. My sister and myself were left orphans. I was about 9 years old and she about six. We were raised to this age on farm near Princeville, Ill, when an Aunt and Uncle brought us to Peoria. There was a sale and everything was sold at public sale except the land, 40 acres which was sold some years later. This Aunt and Uncle raised my sister and I went to school from their till I was able to work. We have looked several times since Aunt and Uncle died, but could find no record only what we have been told that I was born Sept. 25th, 1862. Hoping this will be satisfactory, I am,

Fraternally yours,
R.W. Warren
Lodge No. 27."

A physician who was a representative of the Brotherhood stated that when Warren made application for total disability benefits, he told the witness his age was 55 years. Appellant's general secretary and treasurer testified, by deposition, that he accepted the assured's application for membership under the belief that the applicant was under 45 years of age and that he did not know the statement was false until he received the claim for total disability.

In rebuttal a former neighbor of appellee and the assured stated she attended dinners and birthday parties of the assured, and heard him say at his birthday ~~dinners~~ in each of the years from 1905 to 1908 inclusive, that he was born in the year 1865. She stated that on each of these occasions she asked him how old he was and he replied in substance, "I was born in 18 5. Count it up for yourself." She also testified that she thought there was a similar

11. 0000 0000

Mr. E. H. King, Secy.

conversation in 1909 but was not sure. A daughter of the assured testified substantially the same, but the court refused to permit her to testify to a similar statement by assured in the year 1909. Appellant urges that the evidence of these witnesses was improper and prejudicial but we held in our former opinion that it was proper to show by parties other than appellee, any declarations made by assured as to the date of his birth if made before suit was brought.

Record evidence of assured's prior membership in appellant's order and various sections of its constitution and rules relating to age, residence and occupation of applicants for membership was admitted. It is claimed that such records impute to appellant knowledge of the assured's age, and it is therefore estopped to assert the falsity of the answer. It was not shown what the assured stated his age to be in his prior application for membership. It was testified on behalf of appellant that it was not in possession of the evidence showing such statement because the records were kept only ten years and then destroyed.

The evidence leaves no room to doubt that assured was the same person shown by appellant's record to have been a member of its Enterprise Lodge No. 27, from November 10, 1894, to December 31, 1897, and again by reinstatement from February 13, 1898, to December 1, 1898. At any rate no question of identity was raised in the trial court. It seems to be the settled policy of the law that where an insurance company or society receives an application for insurance in which the applicant makes false answers as to his age or prior membership, and the company or society has in its possession a prior application of such applicant, which shows such answers were false, it is estopped from asserting such false answers as a defense to the policy or certificate issued upon such second application. (Gundiff v. Royal Neighbors, 162 Mo. App. 117; O'Rourke v. John Hancock Mutual Life Insurance Company, 23 R.I. 457; Robinson

v. Bro. of L.F. & E., 170 N.C. 545; Mutual Life Ins. Co. v. Nichols, 26 S.W. 998; Supreme Tribe of Ben Hur v. Owens 50 Okl. 629; Dubich v. Grand Lodge A.O.U.W. 33 Wash. 651.) This doctrine is applicable to the statement by assured in his application that he had never previously been a member of the order and the evidence was admissible on this question. The record does not show that the statements of assured in his various applications were contradictory, and therefore appellant was not estopped on the question of the assured's age. However, we think no substantial error was committed in this behalf. It is a familiar rule that in order to justify a reversal on account of error it must appear that upon another trial, if the same error does not intervene, a different result might be expected. (Stansfield v. Wood 231 Ill. App. 586.)

The burden was upon appellant to show that assured knew his statements were false. The determination of that question was primarily for the jury. By their verdict, they found against the contention of appellant and we cannot say the verdict is so manifestly against the weight of the evidence as to require this court to disturb it. It is also to be observed that appellant has not assigned for error the refusal of its motion for a new trial. This court held in Miller v. Carney 182 Ill. App. 535, that in order to render available an objection that a verdict is against the law and the evidence as stated in a motion for a new trial, it is necessary to assign for error in the record the refusal of such motion.

Appellant urges in this case, as it did on the former appeal, that appellee has failed to prove the payment of assessments or dues for July, 1917. The record shows that on May 29, 1917, Warren sent his benefit certificate to the Grand Lodge with his claim for total disability. They were received by appellant and the benefit certificate was stamped

v. Bro. of L.T. & E., IVO E.C. 845; Mutual Life Ins. Co. v. Nichols, 80 S.W. 998; Supreme Tribe of Ben Hur v. Owens 50 OKL. 629; Dupich v. Grand Lodge A.O.U.W. 38 Wash. 651. This doctrine is applicable to the statement by assured in his application that he had never previously been a member of the order and the evidence was admissible on this question. The record does not show that the statements of assured in his various applications were contradictory, and therefore applicant was not estopped on the question of the assured's age. However, we think no substantial error was committed in this behalf. It is a familiar rule that in order to justify a reversal on account of error it must appear that upon another trial, if the same error does not intervene, a different result might be expected. (Stansfield v. Wood 231 Ill. App. 586.) The burden was upon applicant to show that assured knew his statements were false. The determination of that question was primarily for the jury. By their verdict, they found against the contention of applicant and we cannot say the verdict is so manifestly against the weight of the evidence as to require this court to disturb it. It is also to be observed that applicant has not assigned for error the refusal of his motion for a new trial. This court held in Miller v. Garney 182 Ill. App. 385, that in order to render available an objection that a verdict is against the law and the evidence as stated in a motion for a new trial, it is necessary to assign for error in the record the refusal of such motion. Applicant urges in this case, as it did on the former appeal, that appellee has failed to prove the payment of assessments or dues for July, 1917. The record shows that on May 29, 1917, Warren sent his benefit certificate to the Grand Lodge with his claim for total disability. They were filed by applicant and the benefit certificate was stamped

"cancelled" on June, 6, 1917. Thereafter, appellant received the dues and assessments for the month of July, 1917. We hold in the former opinion that proof of payment had been made, and we now hold that the testimony is sufficient to warrant the jury in finding that it was made. We also conclude that appellant then knew that the statement made by assured in his application for his last membership with reference to his age and prior membership was not correct, and that he was in fact more than 45 years of age at the time he made his last application.

It is well settled that when there is an existing cause of forfeiture known to an insurer, and it thereafter accepts dues and assessments or premiums from the insured, it thereby waives its right to rescind the contract on that ground. (Turey v. Supreme Council Catholic K. & L. of America, 146 Ill. App. 168; Wood v. Mystic Circle, 212 Ill. 532; Order of Foresters v. Schwieterz 171 id. 325; Pegram v. Mutual Protective League 159 Ill. App. 214.) It nowhere appears that either Warren or appellee ever knew of the attempted cancellation of the benefit certificate until it was returned about October 9, 1917 upon demand of her attorneys. And it is not shown that any payment or tender was ever made to assured or to appellee of any of the dues and assessments paid to appellant under the benefit certificate. The contract in this case was not void. If the assured designedly misrepresented his age and prior membership, the most that can be said, is that the contract was voidable. If appellant desired to cancel it, such action required apt notice to be given of the intent to cancel, and a return or tender of the dues and assessments should have been made. (Young v. Union Life Insurance Co. 202 Ill. App. 321.)

Complaint is made as to several instructions given on behalf of appellee. We have examined the instructions complained of and in our judgment they substantially conform to the rulings of this court on the former hearing, and we find no

no error in any of them,

It is urged that it was error to refuse the special interrogatories submitted by appellant. Section 79 of the Practice Act provides that when the special finding of fact is inconsistent with the general verdict, the former shall control. This necessarily implies that the fact to be submitted shall be one which, if found, may in its nature be controlling. That can never be the case with a mere evidentiary fact. (C. & A. R.R. Co. v. Harrington, 192 Ill. 10.) If all the interrogatories submitted had been answered favorably to appellant, the findings would not have been controlling and there was no error in their refusal.

After a careful examination of the record in this case, we find no error which would justify this court in reversing the judgment of the trial court. Accordingly the judgment is affirmed.

Judgment affirmed.

THE CHINESE TEST

THE CHINESE TEST

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Salley

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

24314 671

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 18 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|------------------|---|-------------------|
| Roy H. Hagen, | : | |
| Appellee, | : | |
| | : | Appeal from the |
| v. | : | Circuit Court of |
| | : | Winnebago County. |
| Nels E. Johnson, | : | |
| Appellant, | : | |

Jones J:

Appellee, Roy H. Hagen, brought an action in the circuit court of Winnebago County against Nels E. Johnson, appellant, to recover damages for injuries to his person and his automobile, alleged to have been received in a collision between the cars of the respective parties at a highway intersection in the state of Wisconsin. For the purposes of this opinion, appellee will be referred to as plaintiff and appellant as defendant. Plaintiff was driving a Pontiac coach north along a concrete public highway between the towns of Walworth and Darien. Defendant was driving east in a Packard sedan along a gravel road. A jury trial resulted in a verdict in favor of Hagen in the sum of \$458. A motion for a new trial was overruled and judgment entered upon the verdict, from which this appeal is prosecuted.

The declaration consists of two counts. The first count avers, among other things, that the defendant drove his automobile in a careless, reckless and negligent manner into the intersection from the left, and then and there violated the law of the state of Wisconsin regarding the right of way, and that because of the careless, negligent and reckless manner in which defendant drove his automobile, he ran into and against plaintiff's automobile causing the injuries complained of.

The second count charges that defendant was driving his automobile in a negligent, reckless and improper manner at a rate of forty miles per hour in excess of a reasonable speed as prescribed by the statute of the State of Wisconsin;

Appeal from the
Circuit Court of
Winnebago County.

Wm. W. ...
v.
Wm. W. ...
...
...

James L.

Appellant, ...
this court of Winnebago County, ...
to recover damages for injuries to his person and his automobile
caused by a collision between his automobile and the automobile
of the defendant. ...
of Wisconsin. ...
referred to as plaintiff and appellant as defendant. ...
was driving a ...
between the towns of Walworth and Darien. Defendant was driving
east in a ...
resulted in a ...
motion for a new trial was overruled and judgment was entered
for the plaintiff. ...
The defendant ...
about twenty, ...
automobile in a ...
the defendant from his left, ...
the law of the state of Wisconsin ...
way, and that because of the careless, negligent and
reckless manner in which defendant drove his automobile,
he ran into and ...
injuries ...
The ...
his automobile ...
at a rate of forty ...
speed as ...

and that it ran into plaintiff's car knocking it off the highway and turning it upside down from the blow of the collision. To the declaration the defendant pleaded the general issue.

Section 4 of Chapter 85 of the Wisconsin Statutes was admitted in evidence. That section reads, "The operator of any vehicle on a highway should have the right of way over any vehicle approaching him from the left at every highway intersection, except when a police shall be in actual charge of the traffic at the intersection."

The defendant, Johnson, claims that he was driving at a rate of speed between fifteen and twenty miles an hour when he approached the intersection, and observing the high weeds on his right, he slowed down to between three and five miles an hour as he drove on to the concrete road. He testified that the high weeds extended to within eight or ten feet of the concrete road; that he did not see plaintiff's car until he came out from behind the weeds; that he then saw it coming about 400 feet away and thought he could cross the road ahead of it, but that when he reached the concrete, plaintiff was about 100 feet away coming at a speed of not less than fifty miles an hour. Notwithstanding this testimony, he proceeded on to the concrete until his right front wheel had passed the black center line. He signed a statement in which he said his front wheels were east of the black line.

He further claims that he had turned his car to the north and it was standing still at the time of the impact; that plaintiff's car was swaying, and the back end of it swerved over against the front of his car causing the accident. He admitted that he did not stop at the edge of the concrete road and made no explanation as to why he proceeded to cross the black line in the center, notwithstanding the fact that he testified he saw a car coming at the rate of fifty miles an hour only one hundred feet away. If his car was running only three to five miles an hour at the edge of the concrete, and if he then saw the conditions to which he testified, it was carelessness

and that it ran into Plaintiff's car knocking it off the highway and turning it upside down from the blow of the collision. To the declaration the defendant pleaded the general issue.

Section 4 of Chapter 85 of the Wisconsin Statutes was admitted in evidence. That section reads: "The operator of any vehicle on a highway should have the right of way over any vehicle approaching him from the left at every highway intersection, except when a police shall be in actual charge of the traffic at the intersection."

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He further claims that he had turned his car to the north and it was facing still at the time of the impact; that Plaintiff's car was awaying, and the back end of it swerved over against the front of his car causing the accident. He admitted that he did not stop at the edge of the concrete road and made no explanation as to why he proceeded to cross the black line in the center, notwithstanding the fact that he testified he saw a car coming at the rate of fifty miles an hour only one hundred feet away. If his car was turning only three to five miles an hour at the edge of the concrete, and if he then

on his part to drive onto the pavement and stop with his front wheels across the black line directly in the path of the other car. He admitted that he could have stopped practically in an instant.

It is asserted that plaintiff's testimony shows that when he was a few rods south of the intersection he saw defendant's car, and that this circumstance shows that defendant entered the intersection first, and hence the plaintiff was guilty of contributory negligence. Plaintiff's testimony on this point is not fully abstracted. An examination of the record discloses that plaintiff explained that he meant he was about ten or fifteen feet South of the center of the intersection, or at about the South line thereof, when he first saw defendant's car.

Plaintiff testified that he was proceeding at a rate of speed from twenty to twenty-five miles an hour at the time of the accident, and that defendant's car was running at about the same speed and crashed into his car. In this he is corroborated by other witnesses. His car was turned over into the ditch on the east side of the concrete road, and it lay at a point about twenty feet north of the place of the impact. Defendant's testimony is to the effect that it ran about twenty feet after the impact and then turned over.

The evidence is conflicting and it is impracticable to review it all, but the physical condition of both cars after the accident tends strongly to show that the impact came from defendant's car, and that the front end of it struck the left side of plaintiff's car about the center.

The giving of the first, fourth and fifth instructions on behalf of plaintiff is criticised. The first instruction quoted the section of the Wisconsin statutes above set out, and then stated that if the jury believed from a preponderance of the evidence that the plaintiff had the

on the left side of the road. He admitted that the black line directly in the path of the other car.

It is asserted that Plaintiff's testimony shows that there was a few rods south of the intersection of the road and the defendant's car, and that this circumstance shows that defendant was negligent. Plaintiff's testimony is not fully convincing. It is about ten or fifteen feet south of the center of the road, or at about the South line thereof, when he saw the defendant's car.

Plaintiff testified that he was proceeding at a speed of twenty to twenty-five miles an hour at the time of the accident, and that he was looking at the car of the defendant. He testified that he saw the car of the defendant at a distance of about twenty rods, and that he saw the car of the defendant at a distance of about twenty rods, and that he saw the car of the defendant at a distance of about twenty rods.

The evidence is a little conflicting. It is asserted that the defendant's car was at the right end of it, and that the right end of it was at the right end of it. It is asserted that the defendant's car was at the right end of it, and that the right end of it was at the right end of it. It is asserted that the defendant's car was at the right end of it, and that the right end of it was at the right end of it.

right of way under the law over the defendant, it thereupon became and was the duty of the defendant to allow the plaintiff to pass along and upon the cement highway in front and ahead of the defendant, and that if they further believed from a preponderance of the evidence that the defendant failed to comply with the requirements of said law, and that the plaintiff used ordinary care and caution for the safety of his automobile, and that the failure of the defendant to comply with the aforesaid law caused the accident and injury to the plaintiff's automobile, then the plaintiff was entitled to recover.

It is claimed that this instruction assumes that plaintiff had the right of way merely because the defendant approached from his left, and that it left the construction or interpretation of the law to the jury. In *Partridge v. Erbstein*, 225 Ill. App. 209 the court was urged to definitely fix the distance of an automobile from a street intersection when it **could** be said to be within the statutory description of a vehicle "approaching along intersecting highways from the right." The court said that it would be very difficult if not impossible to lay down a rule in precise terms of measurement applicable to all cases, but suggested that a vehicle is approaching an intersection from the right, within the meaning of the statute, and entitled to the right of way when, on its left, on an intersecting street, another vehicle is approaching whose driver, in the exercise of due care, would or should see that unless he yielded the right of way, the vehicles might or would collide. This rule is followed in *Zapf v. Kuttner*, 229 Ill. App. 406, and the same doctrine is announced in *Lenartz v. Funk* 224 Ill. App. 130.

In view of the relative positions of the two cars with respect to the intersection, as well as their rates of speed, the question whether or not the driver of the car approaching the intersection from the left should have seen that

[illegible]

In view of the relative positions of the two cars
at the intersection, as well as their rates of
travel, it is probable that the driver of the car

The cars would or might collide, unless he yielded the right of way, was one of fact for the jury to decide. (Heidler Co. v. Wilson & Bennett Co. 243 Ill. App. 89.) The instruction as given is not a model of clear enunciation of the law, but we are of the opinion that under the facts in the record, it did not mislead the jury.

The fourth instruction told the jury that if they believed from the evidence and under the instructions of the court that plaintiff had the right of way over the defendant, he had the right to assume defendant would operate and control his car so as to allow plaintiff to pass in front of him at the intersection.

The fifth instruction was to the effect that if the jury believed plaintiff was rightfully using the highway in the exercise of reasonable care and caution, that he had a right to rely upon defendant to so manage and control his automobile as to avoid an accident or collision with plaintiff.

These instructions are subject to the criticism that they point out and emphasize the duties of the defendant. But it does not appear to us that when considered with the evidence in this case they were misleading or prejudicial. The giving of erroneous instructions will not necessarily require a reversal of a judgment, but whether they constitute reversible error depends upon whether it appears from a consideration of the whole record the jury might have been misled and the opposite party prejudiced by it. (Metzger v. Manlove 241 Ill. 113.)

Regardless of all other contentions, we think the admitted facts in evidence fairly tend to establish that defendant, in the exercise of due care, would or could have seen that if he proceeded as he did, a collision was inevitable. The facts do not show that the plaintiff was guilty of contributory negligence. Under such circumstances we would not

Wilson & Bennett Co. 245 Ill. App. 681. The instruction as

believed from the evidence and under the instructions of the
court that plaintiff had the right of way over the defendant

The fifth instruction was to the effect that it is the

jury believed plaintiff was rightfully using the highway in

the exercise of reasonable care and caution, that he had a

right to use the highway in the exercise of reasonable care

and caution, and that he was not negligent in the exercise

of his right of way over the defendant's property.

It is held that the instruction is not erroneous and that

the jury was not misled by the instruction and that the

verdict is supported by the evidence and that the

instruction is not erroneous and that the

verdict is supported by the evidence and that the

instruction is not erroneous and that the

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verdict is supported by the evidence and that the

instruction is not erroneous and that the

verdict is supported by the evidence and that the

be justified in disturbing the verdict.

The judgment of the circuit court is accordingly affirmed.

Judgment affirmed.

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

CHICAGO, ILL.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

_____ of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Shurt

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2481.A.07.15

BE IT REMEMBERED, that afterwards, to-wit: On

MAY 18 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | |
|---|---|
| Joseph George Ainsworth, and | : |
| George Scott Ainsworth, | : |
| Plaintiffs in error, | : |
| | : |
| v. | : |
| | : |
| Peoria Malleable Castings Company, a | : |
| corporation, L.E. Roby, C.A. Pattison, | : |
| Peoria Drill and Seeder Co., a corporation, | : |
| and Hart Grain Weigher Co., a corporation, | : |
| Defendants in error, | : |

Error to
the Circuit
Court of
Peoria
County.

Jones J:

This is a suit in equity brought by plaintiffs in error, Joseph George Ainsworth and George Scott Ainsworth, two stockholders of Peoria Malleable Castings Company, against defendants in error, the said Peoria Malleable Castings Company, L.E. Roby, C.A. Pattison, Peoria Drill and Seeder Company, a corporation, and Hart Grain Weigher Company, a corporation.

The prayer of the bill is that an accounting be had between Peoria Malleable Castings Company, and the other two corporations; and also between the Malleable Castings Company and the defendants Pattison and Roby; that Pattison and Roby be enjoined from acting as interlocking officers and directors of the Malleable Castings Company and the Drill and Seeder Company, and that a receiver be appointed to take charge of the books and accounts of the Malleable Castings Company, and collect the money or property due that company, and for general relief. The original bill of complaint was filed to the March, 1927, term of the circuit court of Peoria County. All defendants demurred to it. On March 19, 1927, the trial court heard arguments on the demurrers and sustained them. Thereupon the complainants made an oral motion for leave to file an amended bill by March 28, 1927. The motion was allowed, and on the last mentioned date the complainants tendered their amended bill and moved the court for leave to file it. The motion was denied and a decree entered dismissing the original

bill for want of equity. Plaintiffs in error contend that the chancellor erred in holding that the amended bill did not state a cause of action and in refusing to allow the complainants to file it.

The amended bill alleges in substance that the defendants Peoria Malleable Castings Company and Peoria Drill and Seeder Company are both Illinois corporations; that complainants are both large stockholders in Peoria Malleable Castings Company and have been such for a number of years; and that the complainants bring their suit in behalf of themselves and all other stockholders of that company who desire to join therein. It alleges that the complainant, George Joseph Ainsworth, is a director of the Peoria Malleable Castings Company and that the defendants, L.E. Roby and C.A. Pattison, are directors, stockholders and officers in both the Malleable Castings Company and the Drill and Seeder Company, Roby being a stockholder, director and president of the former, and at the same time vice-president, treasurer, director and stockholder of the latter; and that C.A. Pattison is a stockholder, director, vice-president and secretary of the Malleable Castings Company, and at the same time, president, secretary, general manager, director and stockholder of the Drill and Seeder Company.

The amended bill further alleges that the board of directors of the Malleable Castings Company consists of eight directors and the board of directors of the Drill and Seeder Company consists of four directors; that Roby and Pattison have for a number of years unlawfully and unfairly dominated the management and operation of both companies, by reason of the fact that they held practically all the official positions of both corporations; that they also dominated and controlled the stockholders' meetings by voting their own stock and proxies, and that they voted stock held by them but not fully paid for; that they were accepting salaries from both companies; that Roby through his domination of the board of directors of the Malleable Castings Company, recouped in December, 1926, a material

bill for want of equity. Plaintiff in error contended that the Chancellor erred in holding that the amended bill did not state a cause of action and in refusing to allow the complainants to file it.

The amended bill alleges in substance that the defendants Teoria Malleable Castings Company and Teoria Drill and Seeder Company are both Illinois corporations; that complainants are both large stockholders in Teoria Malleable Castings Company and have been such for a number of years; and that the complainants bring their suit in behalf of themselves and all other stockholders of that company who desire to join therein. It alleges that the complainant, Teoria Jose H. Ainsworth, is a director of the Teoria Malleable Castings Company and that the defendants, L.B. Roby and G.A. Pattison, are directors, stockholders and officers in both the Malleable Castings Company and the Drill and Seeder Company, Roby being a stockholder, director and president of the former, and at the same time vice-president, treasurer, director and stockholder of the latter; and that G.A. Pattison is a stockholder, director, vice-president and secretary of the Malleable Castings Company, and at the same time, president, secretary, general manager, director and stockholder of the Drill and Seeder Company.

The amended bill further alleges that the board of directors of the Malleable Castings Company consists of eight directors and the board of directors of the Drill and Seeder Company consists of four directors; that Roby and Pattison have for a number of years unlawfully and unfairly dominated the management and operation of both companies, by reason of the fact that they held practically all the official positions of both corporations; that they also dominated and controlled the stockholders' meetings by voting their own stock and proxies, and that they were receiving salaries from both companies; that the domination of the board of directors of the Mal-

increase of his salary as president and unlawfully had it dated back to January, 1926; that from the year 1918 to the date of filing the bill, Robey and Pattison fraudulently diverted the assets of the Malleable Castings Company; submitted financial reports based upon incorrect and padded inventories; sold products to the Drill and Seeder Company, in which they were both financially interested, below production costs in some cases and below sales price in other cases; allowed charges known to be extremely excessive to be made by other companies in which they were financially interested, and unlawfully converted property of the Malleable Castings Company to their own use, all to the material and substantial loss of the company. The bill then sets out specific and detailed charges of alleged fraudulent and unlawful acts on the part of Roby and Pattison, the substance of which is, that while acting as interlocking officers and directors of both corporations, they unlawfully diverted assets of the Malleable Castings Company to the benefit of Roby and the Drill and Seeder Company, resulting in substantial loss to the Malleable Castings Company.

The bill charges numerous objections were made to Roby and Pattison concerning the said alleged unfairness and fraud of the transactions, and that demands were made for an accounting between the two corporations and between the Malleable Castings Company and that such demands were refused; that the matters were on several occasions brought to the attention of the board of directors of the Malleable Castings Company, but that the board failed and neglected to take any action. Many other and similar allegations are contained in the bill, but it is unnecessary for us to set them out.

Defendants in error contend that a stockholder's bill cannot be maintained without demand upon the board of directors of the corporation before suit is filed for such action as complainants desire, unless the bill shows upon its face that such demand would be unavailing; that the amended bill does not show a demand upon the board of directors to act, or facts

showing such a demand would have been useless. It is well settled that if the agents of the corporation in which the authority to control its affairs is vested are themselves guilty of wrong against the corporation, either by personal conversion of its funds, or being interested in another corporation or business, fraudulently manage the affairs of the corporation to its detriment and for the benefit of such other corporation or concern, a court of equity will, upon proper bill filed, interfere, at the suit of a stockholder, to protect his interest in the corporation, without requiring him to first request or demand that the guilty agents proceed, virtually, against themselves. (Wheeler v. Pullman Iron & Steel Co. 143 Ill. 197; Chandler Mortgage Company v. E. J. Loring 113 Ill. App. 423.)

While it is true that suits to obtain relief against the wrongful dealings of directors and officers with the corporate property must be brought in the name of the corporation, yet there is the exception that the stockholder may bring it on behalf of himself and other stockholders, when the board of directors or managers actually or virtually refuse to bring such suit. It is not indispensable that a demand on the board of directors should first be made. If the facts alleged show that a refusal of the board may be inferred with reasonable certainty, then an action may be sustained by a stockholder without alleging or proving a demand upon the board of managers to bring the suit. Equity never requires a useless act. (Higgins v. Lansingh, et al, 154 Ill. 301; Chicago v. Cameron 120 id. 447; Brusckhe v. Der Nord Chicago Schuetzen Verein 145 id. 433; Green v. Hedenberg 159 id. 489; McCrory v. Chambers 48 Ill. App. 445.)

The amended bill charges a condition of interlocking directors, and that both Roby and Pattison held practically all the official positions in both companies, and that they unlawfully and unfairly dominated the management and operation thereof; that they dominated and controlled the actions of the

showing even a demand would have been useless. It is well settled that if the agents of the corporation in which the authority to control its affairs is vested are themselves guilty of wrong against the corporation, either by personal conversion of its funds, or being interested in another corporation or business, it is incumbent upon the directors of the corporation to its detriment and for the benefit of such other corporation or concern, a court of equity will, upon proper bill filed, interfere, as the suit of a stockholder, to protect his interest in the corporation, without requiring him to first request or demand that the equity agents proceed, virtually, against themselves, (See *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 117; *Chandler Hardware Company*

v. R. J. Loring, 115 Ill. App. 483.)

While it is true that suits to obtain relief against the wrongful dealings of directors and officers with the corporate property must be brought in the name of the corporation, yet there is the exception that the stockholder may bring it on behalf of himself and other stockholders, when the board of directors or managers actually or virtually refuse to bring such suit. It is indispensable that a demand on the board of directors should first be made. If the facts alleged show that a refusal on the board may be inferred with reasonable certainty, then an action may be sustained by a stockholder without alleging

proving a demand upon the board of managers to bring the suit. Equity never requires a useless act. (*Whiting v. Lanning*, et al., 134 Ill. 301; *Chicago v. Cameron*, 130 Ill. 447; *Brinscoe v. DeWitt Chicago Schnitzer Verein*, 145 Ill. 483; *Green v. Wedderburn*, 159 Ill. 483; *McGrory v. Champaign*, 48 Ill. App. 445.)

The amended bill charges a condition of interlocking directors, and that both Kelly and Patterson held practically all the official positions in both companies, and that they unlawfully and unfairly dominated the management and operation thereof; that they dominated and controlled the actions of the

directors' meetings and the stockholders' meetings of the Malleable Castings Company, and unlawfully voted stock which was not paid for. It details a number of alleged fraudulent transactions to the material loss of the Malleable Castings Company, and sets forth the demands made upon Roby and Patlison and upon the board of directors of the Malleable Castings Company that the necessary steps be taken to rectify the alleged unfair transactions and that no investigation or action was taken. It also appears that a written demand was made upon the president of the Malleable Castings Company for a meeting of the stockholders in connection with such matters but that no meeting was called or held.

The amended bill alleges repeated demands for relief upon the officers and directors of the Malleable Castings Company and actions by them tantamount to a refusal. We think the allegations are sufficient to bring the amended bill within the rule laid down by the authorities cited, and that it sufficiently states a cause of action cognizable by a court of equity.

Since the amended bill properly stated a cause of action, the chancellor erred in refusing to permit it to be filed. While under the statute in this state, courts have a discretion in permitting amendments, such discretion is not personal, but a judicial discretion, which is subject to review. (*Delfosse v. Kendall* 283 Ill. 301.) The court should have allowed the amended bill to be filed, and if the defendants then desired to challenge its sufficiency, the question could be raised by demurrer. The contention of defendants cannot be sustained except on the theory that the action of the court was tantamount to sustaining a general demurrer, but the record shows a denial of leave to file the amended bill. We are of the opinion that this cause should be reversed with directions to allow the complainants to file their amended bill of complaint, and the decree is accordingly reversed and the cause remanded with directions to allow the filing of said amended bill.

Reversed and remanded with directions.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the_____

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



6650
243-2-1
General No. 8108

Agenda No. 40

APRIL TERM, A. D. 1927

James Jutelis, Appellant,

vs.

Daniel Griffiths, Appellee.

Shurtliff 4-8
Appeal from the County Court of Sangamon County.

Appellant was the owner of a building in the village of Divernon in Sangamon County, which had been closed by the injunction of the United States Court for the Southern District of Illinois, for violation of the Federal Act prohibiting the manufacture and sale of intoxicating liquor. The date of the injunctive order does not appear in the record. On October 8, 1924, appellant filed a petition in said court, praying that said injunctive order be modified so that he could make a lease of said premises for the period of three years from November 1, 1924, to October 31, 1927, to appellee, so that said appellee might operate a billiard hall and cigar store in said building. Appellee became a party defendant to said injunction decree and bound himself by a bond in the penal sum of one thousand dollars, with surety, payable to the United States of America, conditioned that no intoxicating liquor be thereafter manufactured, sold, bartered, kept or otherwise disposed of therein or thereon, and that he would pay all fines, costs and damage that might be assessed for any violation of the National Prohibition Act on said property. The decree was accordingly modified in accordance with the prayer of appellant's petition. The lease was executed between the parties for the period of three years at a rental of eighteen hundred dollars for the full term, payable at the rate of fifty dollars per month. The lease was

dated September 27, 1924, and provided: "It is further agreed and understood that this lease is made subject to and shall not become operative or effective until and unless the decree heretofore entered in the District Court of the United States in the case of **United States of America v. Enoch Wasselaski et al**, chancery No. 298, be modified to permit the foregoing lease to be made and in the event said decree shall not be so modified, then this lease shall be null and void."

The lease further provided: "It is further understood that no intoxicating liquor shall be kept, stored, bartered, sold or manufactured on the premises herein during the term of this lease, and the lessee herein shall in all respects comply with the said decree of said District Court of the United States."

In the lease the lessor, appellant, reserved for his own use and excepted the rear room of the basement of "said store building with ice box therein," and it appears that the lessor and lessee used in common certain portions of the basement. Appellee entered into the possession of the premises and paid the rent to August 1, 1925, the rent on July 1st having been reduced to forty dollars a month. Appellee abandoned and vacated the premises in the latter part of July or early in August, 1925, and on or about August 20, 1925, appellee delivered the keys of the building to appellant and tendered a check, paying the rent to that date. This suit was brought first in justice court to recover the rent for the months of August and September, 1925, under the terms of the lease. The cause was tried upon appeal in the County Court of Sangamon County without a jury, and the court entered a judgment in favor of appellant and against appellee for the amount of said check, which appellant refused to accept. Appellant has appealed.

It further appears that during the June Term, 1925, of said United States District Court, appellee presented his petition,

reciting the former petition presented by appellant, the presentation of said lease and the modification of said injunctive order, and representing that he, appellee, had surrendered the lease and said premises and vacated the same and the building thereon, on and before September 1st, 1925, and was not then in the possession of said buildings or premises. An order was entered on September 16, 1925, reciting the cause and the petition of appellant to modify said decree and reciting said lease and the terms thereof and the giving of said bond by appellee—"It appearing that said Daniel Griffiths has surrendered said building and lease on the first day of September, 1925, and has ceased to occupy said building and premises: It is therefore ordered by the Court that the bond heretofore executed by the said Daniel Griffiths and the sureties thereon is hereby released and discharged, and that the said Daniel Griffiths is hereby released and discharged from any further liability and obligation under the provisions of said decree and writ of injunction in said cause."

For anything that appears in this record all of these proceedings occurred within one year from the granting of the original writ of injunction. Appellant was a party defendant to the injunction suit and is bound by all the orders made in that cause. The purport of the last order was to vacate and set at naught the modified decree entered October 8, 1924, without which the lease would have been void. The entry of the order of September 16, 1925, left appellant without a tenant, without the right to enter into contract with any person to occupy the premises, without the sanction of the United States District Court and the premises under an injunction to remain closed as a nuisance. It follows that the lease, being void as to a portion of the term, is void in its entirety. Appellant apparently mistakes the law in claiming common law rights in a lease or contract into which neither party has the right to enter without the sanction of the court, and which, after being entered into, is subject to the orders of the court.

Especially is this true when the court is dealing with a nuisance and the property is under the control of the court. We have no doubt but that the United States District Court had the authority to cancel the lease in question within the year during which the injunction was to operate, and that the order set out cancelled appellant's lease. **United States v. Duigman**, 4. Fed. (2nd Ser.) 983.

Appellee also presented proof that on two different occasions intoxicating liquor was kept in that part of the basement occupied by the appellant during the time that appellee was in the possession of said premises. The preponderance of evidence shows that these liquors were kept by appellant without the knowledge of appellee, and this was in violation of the injunction and led appellee to ask to be relieved from his bond. The lease which was signed by both parties provided that no intoxicating liquor should be kept upon the premises. This provision was binding upon appellant and appellee. The argument of appellant that this covenant in the lease could be enforced only by appellant has no force, when each of the parties occupy a portion of the premises under the terms of the lease.

Finding no error in the record warranting a reversal, the judgment of the County Court of Sangamon County is affirmed.

Affirmed.

6657a

246 1A, 672²

Gen. No. 8113

Agenda No. 44

APRIL TERM, A. D. 1927

Fred Engle, Appellee,

vs.

North America Benefit Corporation, Appellant.

Appeal from Christian County Circuit Court

SHURTLEFF, P. J.

Appellee brought his suit to recover benefits under a certificate of membership in appellant corporation, issued to his mother, Anna Engle, on May 28, 1925, under which certificate appellee was the beneficiary. The nature of the contract, by-laws, application, motives and method of the appellant corporation are fully set out in **Laughlin v. North America Benefit Corporation**, 244 Ill. App. 391, to which we refer for a more extended statement of the case.

Appellee filed his declaration, setting out the certificate, and alleged that his mother, the member, during her lifetime kept and performed all of the terms, provisions and conditions of said certificate upon her part to be kept and performed, and died January 17, 1926.

Appellant pleaded the general issue and a special plea, setting out the application in writing, which was charged to be a part of the contract. The plea charged that said Anna Engle falsely warranted, after specifying certain diseases, that she did not then have, or never had had any other diseases; and further falsely warranted that she had not received medical attention within the last two years then preceding, when, in fact, said Anna Engle had had prior to the date of said application other diseases, namely, neuralgia and hardening of the arteries, and had received medical attention within the two years prior to the date of said application.

The plea avers that appellant relied upon the warranties. Appellant also filed a plea of tender. There was a replication filed to the special plea, a waiver of trial by jury, proofs were heard before the court and there was finding and judgment for appellee for the face of the certificate in the sum of one thousand dollars. Appellant has appealed.

There was no question raised in this case as to the sufficiency of the declaration, no motion to find for the defendant, no motion in arrest of judgment and no exception to the judgment in the record. Appellant only argues, or asks to argue, its assignment of error, based upon the court's refusal to hold the seventh proposition of law submitted to the court as the law applicable to this case, which was denied. The seventh proposition of law is as follows:

"The court holds as a matter of law that under the law in this case the judgment shall be for \$. dollars, being the amount of premium heretofore paid by the deceased to the defendant as tendered here in court by the defendant to the plaintiff, and costs of this suit."

The court refused to hold the proposition. This proposition is based upon certain proofs appellant submitted, tending to show that the member was treated in February, 1924, by Dr. Rivard for an attack of intercostal neuralgia; he gave her a prescription for indigestion. Dr. Rivard also treated her in her last illness which extended over a period of four weeks, and testified that Mrs. Engle died of angina pectoris. There was one other witness who gave it as his opinion that angina pectoris, if sufficient to cause death, likely had existed as an ailment to the patient for a period of over one year. It is argued that this situation establishes a breach of warranty in the execution of the certificate and forfeits the benefits. In the application it is stated:

"I hereby declare and agree that I am strong and and in good mental

and physical condition and that the above statements as to my occupation, age and physical condition, are true and correct and are made to enable me to obtain a membership certificate in North America Benefit Corporation of Springfield, Illinois. The age and condition of health as stated herein are warranties."

There was undisputed testimony that the full circumstances of the treatment of Mrs. Engle in February, 1924, were fully stated to appellant's agent before the application was signed; that he had known the applicant for many years and was as fully informed as to her condition of health as any of her other neighbors. The application was prepared by appellant's agent, who asked the questions and entered the answers in the blank spaces, and it was signed for the applicant, who could neither read nor write. The proof is conclusive that all questions were answered truthfully. Appellant's agent certified at the end of the application that he had known the applicant for ten years; that a daughter signed the application because her mother could not write; that the answers were given by applicant's authority and appellant's agent recommended applicant as a good risk. We have read all the testimony, and the proof is abundant that at the time this application was signed Mrs. Engle was a strong, active and rugged woman. Dr. Rivard testified that he saw no evidences of angina pectoris in February, 1924. Evidently, under the terms of the application, the warranties were limited to the age and condition of health of the applicant.

It is shown that a replication was filed and the cause was tried upon an issue made by the replication, although appellant has not produced the replication in the record. Under the circumstances we must hold that the rule in **Hancock v. Knights of Security**, 303 Ill. 66, does not apply, and that the rule in **Weisguth v. Supreme Tribe Ben Hur**, 272 Ill. 549, holding:

"In passing upon a similar question in **Provident Life Assurance Society v. Cannon**, 201 Ill. 260, we said: 'Notice to the agent, at

the time of the application for the insurance, of facts material to the risk is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent. (**Phenix Ins. Co. v. Hart**, 149 Ill. 513; **Home Ins. Co. v. Mendenhall**, 164 id 458.) Where the assured discloses facts to the agent and the agent undertakes to fill out the application, and instead of stating the facts as they are disclosed to him inserts in lieu thereof conclusions of his own, the insurance company will not be permitted to insist that the words of the agent, and not of the assured, are warranties, rendering the policy void.—**Phenix Ins. Co. v. Stocks**, 149 Ill. 319; **Royal Neighbors of America v. Roman**, 177 id. 27; **Teutonia Life Ins. Co. v. Beck**, 74 id. 165,' '' does apply to the facts proven in this case.

From the proofs submitted the court did not err in refusing to hold the proposition of law submitted, and the judgment of the Circuit Court of Christian County is affirmed.

Affirmed.

4652a

2461 A. 672³

Gen. No. 8114

Agenda No. 45

APRIL TERM, A. D. 1927

Fred Engle, Appellee,

vs.

North American Protective Corporation, Appellant.

Appeal from Christian County Circuit Court.

SHURTLEFF, P. J.

Appellee brought his suit to recover benefits under a certificate of membership in appellant corporation, issued on November 12, 1925, to his mother, Anna Engle, under which certificate appellee was the beneficiary. The nature of the contract, by-laws, application, motives and method of the appellant corporation are fully set forth in **Laughlin v. North America Benefit Corporation**, 244 Ill. App., 391, to which we refer for a more extended statement of the case. After the decision in that case appellant, with a slight change in name, has made some meager changes in its form of certificate and application as to classes and liability, so that upon its face the contract apparently more nearly approaches the form of a valid contract.

The facts in this case and the abstract, briefs and arguments are almost a duplicate and copy of the facts, abstract and briefs in General Number 8113, **Fred Engle, appellee, v. North America Benefit Corporation, appellant**, taken at the April Term, A. D. 1927, of this court. It appears that the same member, Anna Engle, at a later date, November 10, 1925, in the same manner caused a duplicate application to be signed, naming the same beneficiary, and that appellant issued a duplicate certificate, under its change of name and form, as the application signed and certificate issued in General Number 8113, *supra*. The bills of exception are identical and the

briefs are identical except as to a slight change in the substance of the exhibits. No new or additional questions are raised. It follows that what we have said in that case, General Number 8113, **Fred Engle, appellee, v. North America Benefit Corporation, appellant**, applies to this case, and the same conclusion should be followed.

Accordingly, the judgment of the Circuit Court of Christian County is affirmed.

Affirmed.

6653 a
24013.012
General No. 8092

Agenda No. 26

APRIL TERM, A. D. 1927

Henry G. Anderson, Appellee.

vs.

A. O. Bolen, Appellant.

Appeal from Macon.

NIEHAUS, J.

In this case a bill of equity was filed in the circuit court of Macon county by Henry G. Anderson the appellee, against the appellant, Arthur O. Bolen. The bill alleges, that the appellee and the appellant about August 1913 formed a partnership for the purpose of handling the sale of 28,000 acres of land located in Aitkin county, Minnesota; and that pursuant to the partnership agreement the appellee was to procure from the company who owned the land, the lowest net price which it would take for the sale thereof; and that he did procure a low net price of \$9 per acre. That the appellant was to form a syndicate, which would purchase the land at \$10.50 per acre; and that the profits arising from the sale or sales, by way of commission or otherwise, were to be divided equally between the appellant and appellee. The bill also alleges, that pursuant to the agreement referred to, the appellant did organize a syndicate to which the greater portion of the land was finally sold at a price in excess of \$10.50 per acre; and that the appellant received the benefit and profits arising from this transaction and sale; and from other sales to individuals at a price in excess of \$9 per acre; and that the appellant has received from sales a sum total of more than \$18,000.00, above and beyond the amount which was due him as his proportion of the partnership profits; and that the appellant has failed and refused to make any accounting concerning the profits from the sales and transactions referred to. The bill therefore prays for an accounting and a dissolution of the partnership. The appellant filed an answer denying the existence of a partnership between him and the

appellee; and denied the right of appellee to an accounting. The case was referred to the Master, who heard the evidence and made a report, stating an account between the parties, to which the appellant filed exceptions. Upon hearing of the exceptions, the court entered a decree, overruling the exceptions, and made findings in the decree concerning the contested matters of fact in controversy.

The court by the decree found that on or about the 13th day of August, 1913, complainant and defendant agreed to become partners for the purpose of selling certain lands in Aitken County, Minnesota; and that all moneys, profits or property received by said partnership, by way of commissions or otherwise, should be equally divided between the complainant and defendant, and that by the terms of said partnership agreement, complainant was to obtain the lowest net price possible at which the owners of said lands would sell the same, and that the defendant would organize a syndicate to whom said lands could be sold.

The Court further found, that complainant secured a net price of \$9.00 per acre for the land, and that after said net price was secured the defendant sold to the Sangamon Syndicate 19,928 acres of land at \$10.50 per acre, making a profit of \$1.50 per acre; that defendant also sold to individuals 5,748 acres at a profit of \$1.00 per acre; that defendant took title to section two in township fifty-one, free and clear of encumbrances, and that as part of the profits took title to two second mortgage notes dated December 21, 1914, signed by George A. Keller, trustee, for the principal sum of \$5000 each.

The Court further found by its decree that the defendant received the sum of \$9,338.00 in cash as a portion of the commissions from the sales of said land.

The Court further found, that the defendant afterward sold the west half of said Section Two for the sum of \$3,308.00, and that he received interest upon the notes above described in the sum of \$3000.00.

That the defendant also received miscellaneous items of interest amounting to \$717.75.

The Court by its decree, further found, that the complainant was entitled to an undivided one-half interest in the east half of Section Two, above mentioned, and to an undivided one-half interest in the two second mortgage notes for \$5000.00 each; also found that the complainant is entitled to receive from the defendant the sum of \$8,181.87, being one-half of the moneys received by defendant for and on behalf of the said copartnership.

The Court then ordered the defendant to pay to the complainant the sum of \$8,181.87, with interest thereon from the 2nd day of January, 1925, at the rate of 5 per cent per annum, for his share of the cash profits.

The Court further ordered that defendant assign to complainant an undivided one-half interest in the two mortgage notes of \$5000.00 each, and, in addition thereto, that defendant pay over to complainant one-half of all moneys that he had received as interest on the two notes to December 21, 1920, and further ordered the defendant to transfer to the complainant, by good and sufficient deed of conveyance, an undivided one-half interest in and to the east half of Section Two (2) free and clear of encumbrances.

An appeal is now prosecuted from this decree. It is contended by the appellant, that the allegations of the bill of

complaint are not sufficient to show that a partnership existed between the parties; and the evidence taken as a whole does not show that there was a partnership as a matter of fact. We cannot agree with these contentions. A partnership in particular transactions may exist where the parties are interested together in the purchase and sale of real estate; and where there is an agreement for the division of profit arising therefrom, even though no general partnership existed between the parties. **Phillips v. Reynolds** 236 Ill. 120; and the evidence shows, that while the subject matter of the partnership was but one large body of land, the disposal of this land involved a number of separate transactions with different individuals and at different times; and that the collection and expenditure of different amounts of money are involved in the transactions; and the taking of securities; and a number of trades in connection with the business of the alleged partnership are also involved; all of which presented for adjudication a number of complex matters, which rendered a resort to a court of equity and an accounting necessary and proper. Some of the findings in the decree involved in stating the account between the parties were controverted matters; but we are of opinion, that there is evidence in the record to sustain the findings of the chancellor; and we conclude therefore, that the chancellor was fully warranted by the evidence in his findings and the statement of the account. The decree is affirmed.

Decree affirmed.

6552a
STATE OF ILLINOIS

11 187

APPELLATE COURT

FOURTH DISTRICT

240 L.A. 672

OCTOBER TERM, A. D. 1927.

TERM NO. 62

AGENDA NO. 35.

PAUL A. RICE, :
Appellee, :
VS. : APPEAL FROM THE CITY COURT
E. C. EIDMAN, :
Appellant. : OF EAST ST. LOUIS.

NEWHALL, J. This is an appeal from a decree of the City Court of East St. Louis entered on the confirmation of a master's report finding that there was due appellee from appellant, on an accounting, the sum of \$1,356.46.

The case involved a lengthy and complicated state of accounting between the parties extending over a period of two or three years, and, from the very nature of the character and kind of testimony that was heard, the master was in a much better position to pass upon disputed items of accounting than either the trial judge or this Court.

The master found and reported to the trial court that appellee entered into a written contract on April 1, 1923, with the Modern Appliance Company, under which appellee was to establish a store at his expense, to furnish service for customers, and was to receive a commission fixed in the contract for selling the Modern Appliance Company's merchandise, consisting of a line of washing machines.

On January 10, 1924, appellant acquired the above contract from the Modern Appliance Company, and entered into a supplemental agreement with appellee, whereby certain fixed commissions were agreed upon for sales of machines, and,

among other things, provided that appellee on cash sales was to retain his commissions out of the purchase price, and on time payment sales was to receive all cash paid down up to the amount of his commission, and one-half of the balance on the tenth day of the month following the sale, and the remaining half on the tenth day of the second month; that appellant agreed to pay \$25.00 for each sale that he personally made in the City of East St. Louis, being the territory assigned to appellee, and the contract was to run for one year.

On January 31, 1925, appellant and appellee entered into a similar contract, which fixed the commissions of appellee for sales, and the manner of payment was substantially the same as in the prior contract; that the contract provided that appellee was to furnish a reserve fund of \$500.00 to appellant to insure that appellee, in case of cancellation, would perform his duty as to service and collection obligations, and, when such service was performed, the reserve was to be paid to appellant.

In this contract, it was provided that appellant was to receive only \$12.50 on machines sold by appellant in appellee's territory; that, in case of time payment sales, where it became necessary to cancel the sale and repossess a machine, appellee was to be charged back one-half of the amount paid up to one-half of his total commission, except where the customer's payment exceeded one and one-half times the total commission; and the contract was subject to cancellation on thirty day's written notice by either party.

On November 14, 1925, the parties entered into a further contract, which provided for a surety bond or reserve fund of \$500.00 to cover losses on repossessions of machines or other obligations under the contract, and which reserve fund was to be repaid to appellee if all matters were adjusted

satisfactorily, in case of cancellation of the contract. Compensation by way of commissions were fixed at stated amounts, and appellant agreed to service all machines and make all collections, except the down payments, and provision was made for charging back to appellee a portion of the commissions in case the time payment sales were cancelled. The contract was subject to cancellation on thirty day's notice by either party.

During the month of December, 1925, appellant cancelled the contract by notice to appellee, and in the early part of January, 1926, appellee left appellant's employ.

The master found from the evidence taken by him as follows:-

First,-That appellee repossessed and re-conditioned 41 washing machines belonging to appellant, and that the reasonable value of such services was \$410.00.

Second,-That by the written contract of January 10, 1924, appellant had agreed to pay appellee \$25.00 for each machine sold by appellant in East St. Louis, and that 28 machines were so sold, and that appellant had paid only \$12.50 for each machine, leaving a balance due appellee of \$350.00.

Third,-That appellee was entitled to be credited with the sum of \$500.00, being the reserve fund, which had accumulated out of commissions earned by appellee.

Fourth,-That appellee was entitled to the sum of \$99.00 for commissions on certain washing machines belonging to other companies, which appellant had placed in appellee's store for sale and distribution.

Fifth,-That there were unpaid commissions on sales made by appellee for appellant amounting to \$429.65.

Sixth- That there was due to appellant

as a credit against the foregoing items the sum of \$432.19 for moneys admitted in the bill of complaints to be due appellant and for ~~paid~~ commissions on machines repossessed by appellant from customers, who purchased from appellee, leaving a net balance due appellee on such accounting before the master of \$1,356.46, and the master recommended a decree against appellant for this amount.

Appellant filed objections to the master's report, which were overruled and allowed to stand as exceptions, and, on hearing before the court, the exceptions were overruled, and a decree entered in accordance with the master's findings.

Appellant's first contention is that the item for \$410.00 for repossessing and reconditioning machines is erroneous and should not have been allowed by the master or court, it being urged that the contract clearly shows that the commissions specified therein covered the entire remuneration, which was to accrue to appellee for his services under the contract.

It was expressly provided in the contract that the commissions specified were to be the sole remuneration to appellee for his services, and a court of equity cannot substitute a different contract from the one the parties made. (Clark v. Muir, 298 Ill. 548; Stone v. Palmer, 166 Ill. 463.)

We are, therefore, of the opinion that the trial court should have sustained appellant's objection to the item of \$410.00 for repossessing and reconditioning 41 washing machines belonging to appellant.

The second finding and allowance by the master to appellee was the sum of \$350.00 for alleged balance due on machines sold by appellant in appellee's territory assigned to him in the contract, viz., East St. Louis.

The master found that by the written contract

covering the period in question, for which the allowance was made, the sum of \$25.00 was agreed to be paid by appellant for each machine sold by him in East St. Louis, and that appellant accounted to appellee in his periodic statements for only one-half of this amount under an alleged oral agreement, which was not performed by appellant.

Appellant now contends that, because of the making of monthly statements by appellant to appellee showing only the allowance of \$12.50 for each machine sold instead of \$25.00, as was specifically provided for in the written contract, appellee is precluded from now claiming the stipulated sum of \$25.00 in the written contract.

Appellant testified that the monthly reports and settlements were made subject to any correction that might be due to either party, and with the understanding that each would live up to the contract.

In view of this state of the record, we are of the opinion that the evidence sustains this finding and allowance of the master, and that the court did not err in overruling appellant's objection as to this allowance, and that the decree awarding this particular item of \$350.00 for balance due appellee on account of the sale of 28 washers sold by appellant in East St. Louis should be affirmed.

The third finding and allowance by the master to appellee was the sum of \$500.00, being the so-called reserve fund, which had accumulated in the hands of appellant out of commissions earned by appellee.

The proof shows that the parties entered into a new contract on November 14, 1925, and that on or about November 10, 1925, appellant had taken over the business of appellee, made an inventory, and found that appellee had accounted for all the property then in his possession.

The contract of November 14, 1925, provided that this reserve fund of \$500.00 was to cover all losses in repossessions or other obligations under said contract, and, in case of cancellation and satisfactory adjustment, the reserve was to be repaid to appellee.

The contract was not cancelled by appellee, and the proof does not disclose that there were any losses or repossessions under this contract, for which appellee could be legally held responsible, for that would warrant appellant in retaining this fund; and it appears that the master did charge against appellee's credits on the accounting for repossessed merchandise about \$300.00..

The master heard the witnesses, and was in a much better position than the trial judge or this Court to determine the relative credence to be given the witnesses and the complicated accounts that were examined and reported on by him.

We are therefore, of the opinion that the finding and allowance to appellee of the \$500.00 reserve fund is sustained by the evidence, and that the decree as to this allowance should be affirmed.

The fourth finding and allowance by the master was in the sum of \$99.00 for commissions on certain washing machines belonging to other companies, which had been placed in appellee's store for sale at the direction of appellant, and the proof shows that appellant was paid therefor, and that appellee should be given credit for these earnings, and we are of the opinion that this finding in the decree should be sustained.

The fifth finding and allowance by the master was for unpaid commissions on sales made by appellee for appellant amounting to \$429.65. The proof shows that appellant without cancelling the contract took possession of appellee's business

and sales accounts, and undertook thereafter to operate the business and collect the accounts without giving appellee this privilege.

We cannot say that the evidence does not support the master's finding as to these commissions, for by the terms of the contract they were long past due at the time of the filing of the bill. Appellant contends that appellee in some of his transactions relating to his sales was dishonest. These were comparatively isolated instances, and some of them were known to appellant at the time he executed the renewal contract in November, 1925, and even at this time appellant testified that he checked the property in appellee's possession and found that it balanced with his records.

It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and where the origin of the claim is not inequitable, a fraudulent act in relation to it will not bar relief. (Barnes v. Barnes, 282 Ill. 593.)

The sixth finding of the master gave credit to appellant in the sum of \$432.19 for monies admitted in the bill to be due appellant and for paid commissions collected by appellee on machines afterwards repossessed for appellant, and after giving due weight, as must be given to the master's findings, where the accounting was had after hearing the complicated and involved accounts of the parties, we are unable to say that the master's findings on this item were not supported by the evidence.

The evidence in the record shows a long, complicated, and involved accounting between the parties extending over a considerable period of time in which there was a close question of verity between appellant and appellee, but most of the questions involved were one of fact, and the master saw

and heard the respective witnesses and had before him a large amount of written data, and we are not in a position to say that his conclusions of fact in regard to these matters were not correct.

For the reasons above stated, we are of the opinion that the decree of the trial court should be reversed and remanded with directions to disallow the item of \$410.00 for repossessing and reconditioning 41 washing machines, and that the balance of the decree finding the sum of \$946.46 to be due appellee from appellant be affirmed, and it is ordered that appellee pay one third of the taxable costs in this court and appellant pay the balance of the taxable costs.

REVERSED AND REMANDED WITH DIRECTIONS.

Not to be reported.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1928.

TERM NO. 35.

AGENDA NO. 36.

MYRTLE E. BROWN,
Appellee,

VS.

AMERICAN BENEFIT LIFE IN-
SURANCE COMPANY, formerly
MERCHANTS AND BANKERS LIFE
INSURANCE COMPANY,
Appellant.

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246 1A 673
APPEAL FROM THE CIRCUIT COURT
OF EFFINGHAM COUNTY.

WOLFE, J. This is an action of assumpsit brought by the appellee, the beneficiary named in a life insurance policy on the life of her deceased husband, Robert H. Brown, against the Appellant insurance company. Mr. Brown, at the time he applied for the insurance and when the policy was issued to him, was an agent of the Appellant and soliciting insurance for it. The case was tried upon an amended declaration, in the usual form, counting on the insurance policy with the application therefor and the benefits and provisions thereof, which are set forth in hanc verba in the declaration. The declaration alleges the due execution of the policy and its delivery to the insured by the Appellant and that the said Robert H. Brown did comply with all the terms and conditions of said policy by him to be performed. The policy alleges the receipt of the sum of \$17.50, being the first premium on the policy, said amount paying the insurance for the period ending January 1, 1927.

The conditions, provisions and benefits printed on the back of the policy are, by its terms, made a part thereof, and contain the following clauses: "All stato-

ments made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid the policy or be used in defense of a claim hereunder unless it is contained in the application hereof. This insurance is granted in consideration of the application of the insured for this policy, which is made a part of this contract, and the payment in advance of Seventeen and 50/100 Dollars as a first payment, receipt whereof is hereby acknowledged, which pays for the period ending January 1st, 1927." The policy is dated July 20, 1926.

The application for the policy contains such questions as are usually found in similar applications for life insurance seeking information concerning the age, habits, former illness, if any, and the condition of the health of the applicant. The questions in the application to elicit information relative to the health of the applicant are nine in number; the application also requires the applicant to answer if he had ever had any one of twenty-six enumerated diseases or ailments. All of the questions in the application were answered by the insured at the time he signed the application. The Court does not mean to intimate that the questions in the application were in any manner unreasonable or not proper for determining the advisability of accepting the applicant as an insurance risk. However, in view of the questions which have been raised on the pleadings in this case, it is a material circumstance, as will subsequently appear in this opinion, that the application furnished by the appellant contains numerous questions and specific answers thereto by the insured.

To the declaration the Appellant pleaded the general issue and four special pleas, none of which were verified. After the case had been called for trial and the

jury selected, the Appellant made a motion for leave to file a fifth plea, but the motion was overruled by the lower court. No point or objection is made by the appellant in his brief and argument to the overruling of this motion for leave to file the fifth plea, and it is therefore considered by this Court that any objections to the action of the trial court on this motion has been waived by the Appellant. Furthermore, the motion was addressed to the sound discretion of the trial court and there was no showing by the Appellant of diligence and of some reasonable excuse for not presenting the defense set up in the fifth plea prior to the recalling of the case for trial. *Phenix Ins. Co. v. Stocks*, 149 Ill. page 319.

The first special plea alleges that the premium due under the terms of the policy was never paid by the appellant; That the policy was issued to the insured without consideration; that the policy was delivered to the insured who was the agent of the appellant. A general demurrer to this plea was overruled.

The second special plea alleges that the application executed by the insured "contains false and fraudulent material misrepresentation, which said misrepresentations were made by said assured knowing same to be false and fraudulent and material misrepresentations at the time the same were made, and were then and there made for the purpose of deceiving the defendant, said misrepresentations consisting of matters in relation to the physical condition of the assured and that the defendant did then and there rely upon said statements, and that based upon said misrepresentations the said policy of insurance was issued by the defendant." A copy of the application is attached to said second plea. A general demurrer was sustained to said plea.

The third special plea substantially avers

that at the time of the execution of the application for insurance, the assured was then acting as agent for defendant and writing and selling insurance for it and collecting moneys for it and doing such other and further acts as usually performed by an agent for an insurance company: That said agent did at the time of the execution of said application conceal from defendant certain material matters in relation to the health of said agent and did wilfully conceal material matters in connection with the health of the insured at the time of said application; that the said company did issue the policy of insurance as based upon the said representations made by the assured, its agent, and relied upon said agent's statements, which said representations were then and there falsely and fraudulently made; that at the time the said statements were made the assured well knew that the same were false and fraudulent and that the same would mislead defendant and were made for the purpose of procuring the company to issue its policy to the assured, all of which was had and done while the assured was then and there acting as agent for defendant. A general demurrer to this plea was sustained.

The fourth special plea substantially avers that defendant did not deliver its policy of insurance to assured, but defendant delivered the same to R. H. Brown, as agent, with instructions that said policy was not to be turned over to the assured until the payment of premium, as required by the terms and conditions of said policy; that the plaintiff should not have her aforesaid cause of action, as the agent, R. H. Brown, well knew the instructions and rules of defendant with reference to not delivering said policy of insurance until the payment of premium; that the said R. H. Brown did hold said policy of insurance contrary to his instructions and directions of the defendant, and that the policy was not operative

or effective until the same had been delivered by the agent to the assured and that Brown well knew that the policy was not effective until premium was paid and that the policy was to be delivered only after payment of premium; that the said Brown never paid said premium and therefore there was no delivery of said policy, as the said Brown was holding the same until the premium had been paid, according to agreement and instructions from it, the defendant, etc. General demurrer to this plea was overruled.

Appellant elected to stand by its pleas to which the demurrer had been sustained. To maintain her action, the Appellee proved at the trial that the insured was deceased; that she is the beneficiary named in the policy; that the policy was given to her by her husband during the latter part of July, 1926; that proofs of the death of the insured were furnished the appellant. She introduced in evidence the policy which recited the payment of the first premium. This proof showed a prima facie right of recovery by the Appellee against the Appellant. *Benes v. Bankers Life Ins. Co.* 282 Ill. 236.

It was not necessary for the Appellee to allege or prove the truth of the statements and representations made by the insured in the application for the insurance policy. The falsity or breach of a representation in an application for an insurance policy is a matter of affirmative defense which must be established by the defendant to be availed of as a bar to an action on the policy. *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474; *Phenix Ins. Co. v. Stocke*, 149 Ill. 319.

As before stated, a general demurrer was sustained to the appellant's second plea, which set up the defense that the representations made by the insured in the application were false; and the demurrer was also sustained to appellant's third

plea which alleged that the insured was the agent of the appellant when the application was executed and that he concealed certain material matters relative to his health.

In the application the insured stated that he had never used alcoholic beverages to excess and to no extent uses such beverages; that he was in good health and had no swelling of the face or limbs. The application was introduced in evidence by the Appellant. The appellant offered to prove by two physicians and other persons that the deceased was addicted to the excessive use of alcoholic drinks; that for some time prior to his death he was on numerous occasions intoxicated to such an extent that he was unable to walk without the assistance of other persons; that on occasions it was necessary to take him home in an automobile by reason of the fact that he was intoxicated. Appellant further offered to prove by medical witnesses, that the insured was afflicted with rheumatism; that one of his legs was swollen to a considerable extent; that his condition was such that he was unable to leave his bed; that he remained in such condition for a period of time and recovered to the extent that he was able to walk on crutches, after which he used a cane; that insured's physical condition and intoxication all existed prior to the time of the making of the application and up to the time the application was made. The trial court refused to allow the introduction in evidence of the alleged fact embraced within the aforesaid offer of proof of the Appellant.

It is most earnestly contended by the Appellant that the proof contained in the above offer was admissible under the general issue because the declaration alleges that the insured had kept and conformed to all the conditions, terms and provisions of the policy required to be kept by him. As before stated, the falsity or breach of a representation in an application for an insurance policy is a matter of affirmative

defense. Owing to the clause in the policy that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, the answers made by the insured in his application are representations and not warranties. *Aetna Life Ins. Co. v. King*, 84 App. 171; *Court of Honor v. Clark*, 125 Ill. App. 490. When the statements and answers contained in an application for insurance "are not warranties, but mere representations, to avail as a defense it must be averred and proved that they were false, that the insured at the time knew they were false, or made so recklessly or under such circumstances as that in good conscience wilful falsehood should be imputed to him and that the fact concealed or the falsehood expressed was material." *Aetna Life Ins. Co. v. King*, *supra*.

Furthermore the application for the policy, in the case at bar, contains a large number of answers which are made a part of the policy by its terms and a breach of any of such statements, whether they be warranties or representations, must be alleged specially. 11 Cyc. Pl. & Pr. 423. Broadly speaking, the general issue denies all the material allegations in the declaration; by which are meant, all those allegations which the plaintiff may be required to prove. 9 Cyc. Pl. & Pr. 882; *Benes v. Bankers Life Ins. Co.* 282 Ill. 236.

Appellant has not cited a case decided by a court of this State, or of any other jurisdiction, holding that the affirmative defense of a breach or falsity of a representation contained in an application for an insurance policy can be proved under the general issue; nor has any case been called to our attention holding that the answers in an application are conditions precedent which the plaintiff must allege and prove. From an examination of the cases decided by the courts of this state, we believe it has been, without exception, either in effect held, or assumed as an established rule of pleading, that

that such matters must be specially pleaded. It seems hardly necessary to say that to allow the defendant to plead the general issue to the declaration and then permit him, at the trial, to prove any one of the numerous answers contained in the application to be false, would violate the fundamental rule of pleading that the purpose of the pleading is to advise the parties, before trial, what the opposite side relies upon as a matter of defense. Particularly is this true when our Supreme Court and this Court have established the rule that it is not necessary for the plaintiff to aver or prove the truth of the answers contained in the application. One of the reasons for this rule being that it might be impossible for the beneficiary named in an insurance policy, after the death of the insured, to furnish proof of the truth of all the answers made by the insured in his application. On the other hand, as is stated in the case of *Continental Life Ins. Co. v. Rogers*, supra, page 486, "It is no hardship that if the insurer knows or believes any of the statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest; and if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded."

Another object of a special plea is to give the plaintiff notice of the special defense relied upon by the defendant, and thereby afford the plaintiff an opportunity to set up in his replication such facts, if there are any, which would be an estoppel, waiver or other defense, to the matters alleged in the special plea. *Kelly v. North American Union*, 146 Ill. App. 611.

The general rule is laid down by the writers on pleading and insurance law that breaches of warranties, representations, or statements in the application for an insurance

policy must be specially pleaded, and rules and principles have been formulated by many decided cases requiring such pleas to be certain and definite. 33 C. J. 88; 11. Cyc. Pl. & Pr. 422; 4 Joyce on Insurance, Sec. 3691; 2 Bacon on Benefit Societies and Life Insurance, Sections 454 and 455. The above rule of pleading has been recognized and in fact sanctioned and adopted by this Court in many previous opinions. The case of Phenix Ins. Co. v. Stocks, 149 Ill. 327, is often cited in such opinions to support the views therein expressed. In the latter case the Supreme Court says "In Continental Life Ins. Co. v. Rogers, 119 Ill. page 485, it is said 'the rule seems to be well settled in this State that it is not necessary for the plaintiff, in an action on the policy, to either allege or prove such matters as appear in the application only. To be availed of as a defense with the right to whether they are warranties or representations, merely their falsity or breach by the assured must be set up and proved by the defendant as a matter of defense.'" In Metropolitan Life Ins. Co. v. Zeigler, 69 Ill. App. 447, the defendant pleaded the general issue and a special plea in which he alleged that insured had made false warranties in the application regarding her physical condition. Demurrer was sustained to the special plea. The Appellate Court held that the demurrer should have been overruled. It was argued that the matter set forth in the special plea could have been proved under the general issue, and therefore the demurrer was properly sustained. The Appellate Court held that it was not necessary for the plaintiff to allege or prove such matters as appear in the application, and to be availed of as defense, the falsity or breach by the insured must be set up and proved by the defendant. Hence it would seem that a special plea is not only proper, but necessary and such was the decision of the Court in the subsequent case of Phenix Ins. Co. v. Stocks, 149 Ill. 319". In Coen v. Denver Tp/Mut. F.

Ins. Co. 155 Ill. App. 232, the Court held that such a defense must be specially pleaded. In this case there was a demurrer sustained to the declaration on the ground that the declaration did not aver what interest the plaintiff had in the property destroyed according to his statement contained in the application, which was made a part of the policy. This Court held that it was error for the lower court to sustain the demurrer. The cases of *Fairfield v. Union Life Ins. Co.* 196 Ill. App. 7, and *Monahan v. Metropolitan Life Ins. Co.* 180 Ill. App. 390, announce the same rule although the exact question of such special pleading not being in issue in those two cases. In *Kelly v. North American Union*, 146 Ill. App. 611, it was held, that in the absence of a special plea, the defendant could not be permitted to introduce evidence showing that the insured was addicted to the excessive use of intoxicating liquors where the policy sued on was made incontestable after two years unless the insured became addicted to the excessive use of such liquors.

From an examination of the above authorities, and a consideration of the object and purposes of a special plea according to the principles of good pleading, this Court is of the opinion that the affirmative defense of a breach or falsity of a representation in an application for an insurance policy is not available under the general issue. This Court is not unmindful of the general principle of pleading requiring allegation and proof of the performance of conditions precedent as an essential ^{to recover} under any contract depending on such conditions; and that, under the general issue the defendant has the right to introduce all evidence tending to disprove any fact, the proof of which by the plaintiff is necessary to make out his case. However, as is pointed out in the case of *Benjamin v. Connecticut I. Assn.* 44 La. Ann. 1017, 32 Am. St. Rep 362,

this general principle, in its application to insurance contracts, has been greatly modified in the matter of pleading and proof. In that case it was held that the pleading of the general issue is not sufficient to raise the defense of untrue answers made in the application for the insurance policy, though the policy made the application a part of the contract of insurance, and the plaintiff alleged in his declaration that he had complied with all the conditions, representations and warranties required and imposed by the contract. The above rule of pleading, in its application to actions on insurance policies, is amply sustained by the greater weight of authority. 26 C.J. 500, and cases there cited. *Danvers v. Mut. Ins. Co. v. Schertz*, 95 Ill. App. 656; *Phenix Ins. Co. v. Stocks*, 40 Ill. App. 64.

Appellant next contends that the lower court erred in sustaining the general demurrer to its second and third special pleas. Said pleas as we have now decided, not amounting to the general issue, must be examined to determine if they are in substance sufficient to set up the affirmative defense of breach of the answers contained in the application. It will be observed that the second plea alleges in general terms that the application of the insured contains false and fraudulent misrepresentations, and that the third plea, also in general terms, alleges that the insured, being the agent of the appellant, wilfully concealed matters inconnection with his health at the time of signing the application. Some of the main reasons for the rule requiring the filing of the special plea have been herein stated. To obtain the object and purpose of such rule, a special plea must necessarily be informative in the sense that it must allege facts, and not merely general allegations and conclusions of the pleader. In this case the second plea alleges that the application of the insured contains

false and fraudulent material representations which were made by the insured knowing them to be false and fraudulent. The third plea alleges that the insured wilfully concealed material matter in connection with his health at the time he signed the application "and which representations were then and there falsely and fraudulently made", the insured knowing them to be false and fraudulent. When fraud is pleaded, there must be specific allegations setting out the facts upon which the claim of fraud rests, and not merely the conclusions of the pleader. *People v. Omen*, 290 Ill. 59; and a demurrer does not admit fraud where the pleading demurred to does not aver such facts as amount to fraud. *Wandschneider v. Vanschneider*, 282 Ill. 286. The second and third pleas do not set out facts showing a breach of any of the representations contained in the application and the pleas were therefore subject to general demurrer. *Atlas Ins. Co. v. Robinson*, 94 Ark. 390, 127 S.W. 456; 33 C.J. 88; *Norwich Union F. Ins. Soc. v. Prude*, 156 Ala. 565, 46 S. Rep. 974.

The policy provides that no statement shall avoid the policy or be used in defense unless it is contained in the application. The third plea does not state that any answer made by the insured in the application is untrue. "Fraud may be predicated upon the suppression of truth but breach of warranty must be based upon the affirmation of something not true." *Burnett v. Union Distilling Co.* 90 Ill. App. 299, quoting from *Dillebar v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182.

Appellant also assigns as error the refusal of the trial court to permit the appellant to introduce evidence, as alleged in the first and fourth special pleas, that the first premium on the policy had not been paid and that the policy was not delivered to the insured, but merely placed in his

possession, and not to be effective, until the first premium is paid. Our Supreme Court has decided that an insurance company, on the ground of public policy, will be estopped to prove, for the purpose of avoiding the contract of insurance, that the premium acknowledged in the policy to have been paid, was not, in fact, paid. *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384. As the general issue and neither of the said special pleas are verified as required by Section 52 of the Practice Act, the Appellant could not deny the execution and delivery of the policy as is alleged in the declaration. *Helbig v. Citizens Ins. Co.* 234 Ill. 251. In the case of *Bippus v. Vail*, 230 Ill. App. 633, the defendant filed a verified plea, setting up that the note sued on was not executed by him. This Court held that the plaintiff was, by reason of the filing of the plea required to make proof of the delivery of the note. The Bippus case is explained in *Woodlawn Trust & Savings Bank v. Donaho*, 239 Ill. App. 158. In support of both propositions announced in this paragraph the court cites, *Gary Nat. Life Ins. Co. v. McQuaid*, (Ind. App.) 138 N.E. Rep. 353; *Penn. Mut Life Ins. Co. v. Norcross* (Ind. Sup.) 72 N.E. 132.

The trial court directed a verdict in favor of the appellee at the close of the evidence, and we are of the opinion that this action of the Court was correct. The verdict and judgment are for \$2000.00, the amount of the policy, and the judgment is affirmed.

Not to be reported.

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